

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

TRATHONY GRIFFIN, MICHAEL
GODWIN, and FRANK CALLACE,

Plaintiffs,

-against-

SIRVA, INC.; ALLIED VAN
LINES, INC.; and ASTRO MOVING
AND STORAGE CO., INC.,

Defendants.

: 11-CV-1844 (MKB)

:
: United States Courthouse
: Brooklyn, New York

:
: Thursday, November 20, 2014
: 9:30 a.m.

- - - - - X

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE MARGO K. BRODIE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: LICHTEN & BRIGHT, P.C.
475 Park Avenue South
17th Floor
New York, New York 10016
BY: STUART LICHTEN, ESQ.

For the Defendant: ALBANESE & ALBANESE LLP
Astro Moving and 1050 Franklin Avenue
Storage Co, Inc. Suite 500
Garden City, New York 11530
BY: HYMAN HACKER, ESQ.
JOHN E. SCHAEFER, JR., ESQ.

Court Reporter: SHERRY J. BRYANT, RMR, CRR
225 Cadman Plaza East
Brooklyn, New York 11201
sbryant102@verizon.net

Proceedings recorded by mechanical stenography, transcript
produced by Computer-Assisted Transcript.

SMITH - DIRECT / HACKER

2

1 (In open court.)

2 THE COURT: Are we ready to proceed, Counsel?

3 MR. HACKER: Yes.

4 MR. LICHTEN: Yes.

5 THE COURT: Please bring in the jury.

6 (Jury enters courtroom.)

7 THE COURT: Good morning, ladies and gentlemen.

8 Thank you for being on time. We're going to continue the
9 trial. Counsel, please call your next witness.

10 MR. HACKER: We call Laura Smith.

11 (Witness sworn.)

12 COURTROOM DEPUTY: Could you please state and spell
13 your name for the record.

14 THE COURT: Have a seat and pull the mic to you.

15 THE WITNESS: Laura Smith.

16 THE COURT: You can pull the mic to you. Please
17 proceed, Counsel.

18 **LAURA SMITH,**

19 called by the Defense, having been first duly sworn, was
20 examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HACKER:

23 Q Good morning, Ms. Smith.

24 A Good morning.

25 Q Are you currently employed by Astro Moving and Storage?

SMITH - DIRECT / HACKER

3

1 A Yes, I am.

2 Q And how long have you been employed there?

3 A Twenty-two years.

4 Q And what is your present position?

5 A Bookkeeper, office manager.

6 Q And have you had that position all those years?

7 A Bookkeeper for most of it. Office manager for about the
8 last three.

9 Q Okay. And what role, if any, do you have with respect to
10 employees' payroll matters?

11 A The only time I ever had anything to do with payroll is
12 if an additional check needed to be cut for additional hours
13 may be due somebody. We would cut a payroll exchange check.

14 Q Can you explain when that would happen that there would
15 be additional hours?

16 A If someone got their check and was -- you know, thought
17 that the hours were wrong, they would see Keith in dispatch.
18 And then he would look through the daily sheets. They would
19 go over it. If he was due additional hours, then it would be
20 submitted to me as a check request for the additional time.

21 Q Okay. Then what would you do?

22 A I would cut a check and do it immediately and give it to
23 the driver or helper.

24 Q So would it be put into the next week's payroll?

25 A No, no.

SMITH - DIRECT / HACKER

4

1 Q It would be before that; is that right?

2 A Yes, always right that same day.

3 Q How often did it happen that there were extra checks that
4 had to be cut because of an error in the initial payroll?

5 A We might have it once a month. I mean, it's not an often
6 thing that happened all the time.

7 Q All right. So on another front, you've worked there for
8 22 years; is that right?

9 A Yes.

10 Q And how long has Mr. Keith Verderber been there?

11 A As long as I've been there.

12 Q So you know him a long time?

13 A Yes.

14 Q In all the years you've been there, have you heard Keith
15 Verderber shout racial curses at any of the African-American
16 or Hispanic employees at Astro?

17 A No, never.

18 Q Never?

19 A No, huh-uh.

20 Q Well, the jury is looking at you. Is it possible that
21 because --

22 THE COURT: Counsel. Counsel, ask your questions.

23 MR. HACKER: I am.

24 THE COURT: No comments, please --

25 MR. HACKER: I'm asking.

SMITH - CROSS / LICHTEN

5

1 THE COURT: -- as to what the jury is doing.

2 Q Is it possible that one would -- that you might not be
3 sensitive to those comments because you're white?

4 MR. LICHTEN: Objection, "possible."

5 THE COURT: Sustained.

6 Q Are you sensitive to racial comments?

7 A Yes, I would be sensitive to racial comments.

8 Q And why is that?

9 A Because my son is half black. It would bother me.

10 Q And who's the father of the child?

11 A Ronald Hardy.

12 Q And is he related in any way to Astro Moving and Storage?

13 THE COURT: Sustained. Next question, Counsel.

14 Q Is Ronald Hardy a former employee?

15 THE COURT: Next question, Counsel. Move on.

16 MR. HACKER: I have no other questions.

17 THE COURT: Cross-examination.

18 MR. LICHTEN: Yes. Can the witness be shown the
19 defendant's exhibit list, defendant's exhibits?

20 THE COURT: You can ask her anything about them that
21 she happens to know about.

22 CROSS-EXAMINATION

23 BY MR. LICHTEN:

24 Q Could you look at what's been marked Defendant's Exhibit

25 A. Do you see Defendant's Exhibit A?

SMITH - CROSS / LICHTEN

6

1 A In this book?

2 Q Yes. It's actually 1 in the book.

3 A Okay. First page you're talking about?

4 Q Well, the whole exhibit. Are you familiar with that type
5 of document?

6 A Yes.

7 Q What is it?

8 A It's a daily sheet.

9 Q You mentioned in your direct testimony the daily sheets.
10 These are the daily sheets; is that right?

11 A Yes, it's a daily sheet.

12 Q Do you, as part of your job, look at the daily sheets and
13 put the number of hours each employee worked into --

14 A No.

15 Q Have you ever in your job, in your 22 years at Astro,
16 dealt with the daily sheets?

17 MR. HACKER: Objection, vague question. "Dealt
18 with."

19 THE COURT: Objection is overruled. You can answer
20 the question.

21 A The only time I deal with it is when I'm -- I settle out
22 owner-operators as part of my job, and I go to the daily sheet
23 to see if a local driver or helpers were sent out to load a
24 shipment, to see if the driver needed to be charged a Rule 19.

25 Q How are the time for Astro employees kept? Are those

SMITH - CROSS / LICHTEN

7

1 time sheets the time records for Astro employees?

2 A I don't know. I don't do payroll.

3 Q Do you know is there a punch clock at Astro?

4 A Yes.

5 Q And what workers use the punch clock?

6 A The office.

7 Q And who would work in the office?

8 A Myself, dispatch, girls in accounting, solicitation.

9 Q Are you paid hourly?

10 A Yes.

11 Q Do you use the punch clock?

12 A Yes, I do.

13 MR. HACKER: Objection, it's beyond the direct.

14 THE COURT: Overruled. It's overruled, Counsel.

15 MR. LICHTEN: I have nothing further.

16 THE COURT: Is there anything else?

17 MR. HACKER: No, Your Honor.

18 THE COURT: You're excused.

19 THE WITNESS: Thank you.

20 THE COURT: Is there another witness, Counsel?

21 MR. HACKER: No, Your Honor. We rest.

22 THE COURT: Okay, ladies and gentlemen. So both

23 sides have rested. It means that the only thing left in the

24 case is for the parties to make their summation arguments to

25 you as to what they believe the evidence shows and for me to

PROCEEDINGS

8

1 charge you. Right now, we still have to, myself and the
2 parties, discuss the charge that I will give to you. So we're
3 not ready to move forward with summations yet. If I had known
4 this witness would have been so short, I would have had you
5 come in later today.

6 So you're going to have a break. It is now almost
7 10:30, so we probably won't be ready to go until 12. So
8 you're going to have an hour-and-a-half break. You can leave.
9 All I ask is that you come back by 12 and we'll be ready to go
10 then. Okay? I apologize for the inconvenience.

11 (Jury exits courtroom.)

12 THE COURT: With regard to the overtime wages, my
13 understanding is that plaintiffs have to prove their case as
14 to whether or not they're entitled to overtime; and the
15 defendant then has to prove whether or not plaintiffs are
16 loaders, as they claim, as an affirmative defense. Am I wrong
17 about that?

18 MR. LICHTEN: I don't believe so. I believe Your
19 Honor is right.

20 THE COURT: The charges you proposed, Counsel, which
21 is why I'm asking, is that that determination has to be made
22 first. But I believe this exemption is asserted as an
23 affirmative defense, which means plaintiffs have to first
24 prove their claim, and then if the jury finds that there is a
25 claim they then have to consider whether or not they fit under

PROCEEDINGS

9

1 the exception. Counsel?

2 MR. HACKER: That's what I would understand, yes.

3 THE COURT: If you look on page 1, at the bottom of
4 your charge, continuing into 2, Counsel, you suggest that the
5 jury needs to first find the issue as to whether or not they
6 even fit. I thought it was the other way around.

7 MR. LICHTEN: Well, I don't say that the burden is
8 on the plaintiff.

9 THE COURT: It's not a burden issue. So as an
10 affirmative defense, my understanding is plaintiff has to
11 prove first, and it's only if the jury finds that that they
12 then even get to that issue.

13 MR. LICHTEN: Okay. I don't --

14 THE COURT: Okay. Well, I'm going to finish working
15 on the charges now. I should have it for the parties in half
16 an hour. It's 10:30. I should have it for you by 11 or
17 shortly after 11, and I'll give it to the parties and give you
18 some time to review it before we discuss it. Okay?

19 MR. HACKER: That's fine. Thank you.

20 (Recess.)

21 (In open court outside the presence of the jury.)

22 THE COURT: Okay. Have the parties had a chance to
23 review the draft charges?

24 MR. LICHTEN: Yes.

25 MR. HACKER: Yes, Your Honor.

CHARGE CONFERENCE

10

1 THE COURT: I'll hear comments from both sides,
2 starting with you, Counsel.

3 MR. LICHTEN: Your Honor, plaintiffs have two
4 objections to the Court's draft jury instruction. The first
5 has to do with page --

6 THE COURT: Just tell me what page. You can sit,
7 Counsel, and turn your mic on. I think your mic is off. Is
8 the green light on? There you go. What page number?

9 MR. LICHTEN: Seventeen.

10 THE COURT: Go ahead.

11 MR. LICHTEN: The first full paragraph states: "It
12 is your responsibility to determine if plaintiffs have proven,
13 by a preponderance of the evidence, that defendant
14 unreasonably terminated their employment based upon their
15 criminal convictions. You are to consider if the decision
16 made by defendant was reasonable in light of the statutory
17 factors to be considered, not whether you personally would
18 have made the same decision."

19 Now, I'm not -- plaintiffs are not sure where that
20 unreasonable defense is found. It's not in the statute.
21 Section 752 --

22 THE COURT: I'm sorry, which part of this are you
23 complaining about?

24 MR. LICHTEN: The part that says the defendant has
25 to have unreasonably terminated the employment and it has to

CHARGE CONFERENCE

11

1 be reasonable, not whether you personally would have made the
2 same decision. In other words, it can be a different decision
3 and still not have violated the statute. I think the statute
4 merely says that no employment shall be denied by reason of an
5 individual having been previously convicted of one or more
6 criminal offenses unless there is a direct relationship or
7 unless there's an unreasonable risk to property.

8 THE COURT: So what do you believe this paragraph
9 should say?

10 MR. LICHTEN: I think particularly the second
11 sentence but more likely, more probably the whole paragraph
12 should just be eliminated. The question is whether the jurors
13 personally would have made the same decision, and the jurors
14 are deciding whether discrimination occurred here, not whether
15 it was reasonable or not.

16 THE COURT: No, they're not deciding based on their
17 own views whether or not discrimination occurred here.
18 They're deciding whether or not discrimination occurred, based
19 on the law and reviewing these facts.

20 MR. LICHTEN: I believe this standard comes from the
21 Article 78 proceedings where a public agency is given the
22 benefit of the doubt, and you cannot prove an Article 78
23 violation unless you show that it was arbitrary or capricious
24 or unreasonable. There could be more than one decision that
25 could be reasonable.

CHARGE CONFERENCE

12

1 THE COURT: Correct, but it's the same statute being
2 applied. The only reason this statute, as far as I know --
3 and I do recall conducting extensive research on this --
4 hasn't really -- at least it hasn't been enforced and there
5 are no reported cases with regard to private entities. So the
6 issue is what exactly is the standard for a private entity and
7 is it any different than the standard as applied to the public
8 agencies.

9 MR. LICHTEN: Right. And I think it should be
10 different than the standard applied to public agencies.

11 THE COURT: Well, how should it be different? Are
12 you saying that a private individual's conduct shouldn't be
13 reviewed for reasonableness or there shouldn't be any standard
14 at all? It's just whether or not a jury believes that they
15 didn't meet these factors?

16 MR. LICHTEN: Correct. Whether or not the jury
17 believes that the individual was fired for his criminal
18 conviction, even given the exceptions. They can find there
19 was a direct relationship, then they can find that the statute
20 wasn't violated. If the jury finds that there was an
21 unreasonable risk to the safety of the public, then they can
22 find that the statute wasn't violated.

23 But there's no -- I mean, as Your Honor said in
24 footnote 13 of the decision in this case on the summary
25 judgment, this action is against a private employer and,

CHARGE CONFERENCE

13

1 therefore, not subject to arbitrary and capricious review.

2 THE COURT: Right.

3 MR. LICHTEN: I mean to say that a reasonable
4 decision, whichever way it goes, is similar to saying it has
5 to be arbitrary and capricious to be overturned, it has to be
6 unreasonable to be overturned.

7 I don't think there can be more than -- there's only
8 one right answer. Either the defendants -- either the
9 defendants discriminated against the plaintiffs or they
10 didn't, not whether their actions were reasonable under the
11 circumstances. Then a juror could find either that they
12 did -- they could have fired them or they could not have fired
13 them. Both could be reasonable under this standard.

14 THE COURT: I'm not sure I'm fully following you,
15 Counsel, but give me a minute, let me just re-read this part
16 of the charge again. And I'll hear from the defendants on
17 this also. I'm re-reading from page 16, so just give me a
18 minute. (Pause.)

19 Okay, I will take that paragraph out. I believe you
20 are correct, that the only issue is whether or not there
21 was -- which is what I believe defendants are claiming -- a
22 direct relationship between the convictions of the defendants
23 and their job -- the plaintiffs, I'm sorry, and their job
24 responsibilities.

25 MR. HACKER: Your Honor.

CHARGE CONFERENCE

14

1 THE COURT: Yes.

2 MR. HACKER: Do you want my comment?

3 THE COURT: Sure.

4 MR. HACKER: I think that, if anything, maybe the
5 second sentence is confusing to a juror, could come out. But
6 I think the first sentence or, in fact, even the second
7 sentence, if you ended at the word "considered" and take off
8 the not -- whether you personally would have -- in other
9 words, if you simply -- because after all, the whole idea is
10 that you've given them the factors and now the question is,
11 was there a reasonable determination, based on these factors.

12 So when you say determine if it's unreasonably
13 terminated, you're I think applying to the factors right
14 above, that's the way it would be understood, and you are to
15 consider if the decision made was reasonable in light of the
16 statutory factors to be considered. That's exactly right. I
17 think that's clear and it's helpful to the jurors.

18 I understand not really personally would have made
19 the same decision perhaps is unnecessary so, you know, perhaps
20 a surplus, but I don't think it should come out because it
21 sort of summarizes after the factors, now what?

22 So that would be my comment.

23 THE COURT: It's telling them that they have to find
24 whether or not there's a direct relationship between the prior
25 conviction and their employment. I could, instead of this

CHARGE CONFERENCE

15

1 paragraph, say if you find that there was a direct
2 relationship between -- because that is really the finding
3 that we're asking them to do -- that there was a direct
4 relationship between plaintiffs' prior convictions and their
5 specific job duties then you must find for defendant.

6 And then I'll add the other sentence, which says:
7 If, however, you find there was no direct connection between
8 plaintiffs' prior convictions and their specific job duties,
9 you must find for plaintiffs. And this way, I'm not
10 qualifying what the finding needs to be, simply telling them
11 what the law is and telling them that they have to make the
12 finding. Okay?

13 And I'm sorry, on page 16, that one sentence right
14 after the block quote, that needs to be moved to the
15 second-to-last paragraph on page 17 at the beginning. That
16 second-to-last paragraph currently reads: "If you find that
17 Plaintiff Griffin was not terminated but that he quit
18 voluntarily." I'm going to put that sentence, "Defendant
19 contends that it did not terminate Plaintiff Griffin," at the
20 beginning of that paragraph. Okay?

21 Tell me your next objection, Counsel.

22 MR. LICHTEN: The next objection is an instruction
23 that is not in the draft charges but that should be. Given
24 that counsel for Astro elicited testimony from Mr. Verderber
25 that Allied -- that Astro was a subsidiary of Allied and then

CHARGE CONFERENCE

16

1 that Astro and Allied had a franchisee-franchisor
2 relationship, I think the jury should be instructed that
3 Allied is a separate company; and on top of that, they should
4 be instructed in accordance with the request that I made of
5 the Court. Requirements, preferences or attitudes of Astro's
6 clients or customers, such as Allied Van Lines, Inc. or Sirva
7 Inc., are not a defense to a discrimination claim.

8 THE COURT: Let me make sure I understand the
9 argument you're making. You're suggesting that because
10 there's testimony of a close relationship or some relationship
11 between Astro and Allied and there's been testimony that
12 Allied is the company that required the background check that
13 it needs to be clarified to the jury that, in fact, they're
14 two separate companies?

15 MR. LICHTEN: Allied -- according to the testimony
16 of Mr. Verderber, Allied required him to remove these two
17 plaintiffs from all Allied jobs. And he also said that,
18 essentially, Astro is part of Allied. He used different
19 language, that they're a subsidiary, they represent Allied,
20 they are Allied, it says Allied on the trucks.

21 And the jury could find that if Allied really is the
22 parent company of Astro, then they really had no choice but to
23 fire these two individuals because they were getting an order
24 that they could not comply with.

25 But it's not a defense -- the reality of the

CHARGE CONFERENCE

17

1 situation is that Astro is an agent of Allied. It's a
2 separate company. It has a contractual relationship with
3 Allied. But what Allied wants them to do is not a defense if
4 what Allied wants them to do is unlawful. And I think there
5 are cases that say that and that --

6 THE COURT: What's the page number of your charge
7 that you're referring to, Counsel?

8 MR. LICHTEN: It's the next-to-last page, the last
9 at the bottom.

10 THE COURT: The paragraph that starts that
11 requirements, preferences or attitudes of Astro's clients --

12 MR. LICHTEN: Correct.

13 THE COURT: -- are not a defense to the
14 discrimination claim?

15 MR. LICHTEN: Right.

16 THE COURT: What is defendant's position on this?

17 MR. HACKER: The first part that he was separating
18 the two entities, I don't think it's necessary. I thought his
19 cross-examination was quite effective to make it clear that
20 Mr. Verderber didn't really understand the legal relation,
21 that it was -- Your Honor even questioned on that and made it
22 clear that it was an agency.

23 THE COURT: I did, but I don't think there's
24 anything in the record that makes it clear that they weren't.
25 I asked the questions because I did become confused as to the

CHARGE CONFERENCE

18

1 relationship by the testimony that they're a franchisee. I
2 understood it to be a contract only because I've reviewed the
3 documents and ruled on a summary judgment motion, but I don't
4 know that the jury understood that.

5 MR. HACKER: I really don't have a problem with
6 clarifying that if you think it's still unclear. But this
7 other part, I don't know -- we're not saying that -- I don't
8 think we have said that Astro's -- you know, its principal had
9 this policy and, therefore, notwithstanding anything else,
10 Astro's innocent on this.

11 But that doesn't mean it isn't some sort of a
12 consideration that -- in other words, I think a negative
13 statement here would suggest to the jury that that's, you
14 know, completely irrelevant. Again, we're not saying it's a
15 defense. We never did say it was a defense.

16 THE COURT: Right. I think what you're really
17 asking me for, Counsel, is an instruction that maybe under the
18 statute an employer is required to comply with the statutory
19 requirements, and that here Astro is plaintiffs' employer or
20 at least they were during the pertinent time.

21 So it's not so much that any relationship with
22 Allied or Sirva isn't a defense. I mean, they are free to
23 argue, look, because all of our business or substantially all
24 of our business was with Allied, as a practical business
25 matter, we had to comply with their requirements. That

CHARGE CONFERENCE

19

1 doesn't in any way negate their responsibility under the
2 statute. I think that's what you're asking for.

3 MR. LICHTEN: Right. But if complying with their
4 requirements violates the law, then it violates the law.

5 THE COURT: And that's the argument that you will
6 make to the jury. But I can't say to the jury in a charge
7 that any preferences, requirements or -- I'm not sure that I
8 can go that far. Right? You have to put it together. Let me
9 just look at the charge and see how I can change it.

10 At the end of that section, I could insert something
11 along the lines of using the first part of what you have:
12 Requirements, preferences or attitudes of Astro's clients or
13 customers, such as Allied Van Lines or Sirva, Inc., are not
14 relevant to your determination of whether or not defendant
15 complied with its obligation under the statute.

16 MR. LICHTEN: That's okay.

17 THE COURT: I think that takes care of the concern
18 of both sides.

19 MR. HACKER: I would also add principal rather than
20 just customer or client. I don't think they really were a
21 customer or client. I don't know if they understand the term
22 "principal," but....

23 THE COURT: Wait one second. I told the jury to
24 come back at 2.

25 Okay, is there anything else from you?

CHARGE CONFERENCE

20

1 MR. LICHTEN: No.

2 THE COURT: Now, with regard to is the charge clear
3 as you understand it should be for purposes of the Labor Law
4 claims?

5 MR. LICHTEN: Yes, it's fine.

6 THE COURT: Okay. Counsel?

7 MR. HACKER: We had an objection. We'd like to add
8 on page 12 at the bottom, the last -- next-to-the-last full
9 paragraph.

10 THE COURT: So to add to where it says "defendant
11 claims that his helpers are loaders"?

12 MR. HACKER: Yes, because I think that in addition
13 to the loading duties, we had solicited testimony about the
14 other types of duties that a helper would engage in, such as
15 having to get out of the vehicle when there are traffic
16 situations.

17 THE COURT: But where's your legal support for --

18 MR. HACKER: Regulation 782.4(a).

19 THE COURT: You need to give me a copy of that. I
20 couldn't find that in the case law. I utilized the case law
21 to determine when exactly does conduct affect the operation
22 safety, and so that's what I used for purposes of drafting
23 this.

24 MR. HACKER: I have it right here.

25 THE COURT: Okay. And tell me what this regulation

CHARGE CONFERENCE

21

1 is.

2 MR. HACKER: I can read it to you. It says 782.4.

3 THE COURT: That says what? That deals with what?

4 MR. HACKER: It says --

5 THE COURT: Not the specific regulation, what it
6 says, but what regulation are you citing to? Is this under
7 the Motor Carrier Act?

8 MR. HACKER: It's Wage and Hour Division of the
9 Labor Department's regulation.

10 THE COURT: Okay.

11 MR. HACKER: Part 782 of the Labor Department
12 regulations. So that's 29 --

13 THE COURT: You have to use your mic.

14 MR. HACKER: I believe the rule is 29 CFR. I just
15 have it printed out. It has 782.4, drivers' helpers. It's
16 the regulation defining what a driver's helper is.

17 THE COURT: Okay. And what does the regulation say?

18 MR. HACKER: This is the middle of the paragraph.
19 It says, amongst the things that are part of what makes what a
20 helper definition: Dismount when a vehicle approaches a
21 railroad crossing, let the driver close the tracks, some
22 similar --

23 THE COURT: Sorry, you have to say it slowly and
24 clearly so the court reporter can get it down.

25 MR. HACKER: Dismount the vehicle when -- "Dismount

CHARGE CONFERENCE

22

1 when the vehicle approaches a railroad crossing and flag the
2 driver across the tracks, and perform a similar duty when the
3 vehicle is being turned around on a busy highway or when it is
4 entering or emerging from a driveway; in case of a breakdown:
5 (1) place flags, flares, and fuses as required by the safety
6 regulations; (2) go for assistance while the driver protects
7 the vehicle on the highway, or vice versa; or (3) assist the
8 driver in changing tires or making minor repairs and assist in
9 putting on or removing chains."

10 THE COURT: And what does the statute say with
11 regard to being a driver's helper? You just defined for me
12 what the acts of being a driver's helper are. So what does
13 that mean under the statute?

14 MR. HACKER: The statute says if you're a driver's
15 helper, you're exempt.

16 THE COURT: That if you're a driver's helper, you're
17 exempt?

18 MR. HACKER: There are four categories of exemption:
19 Driver, helper, loader, mechanic.

20 THE COURT: Right. And so you want me to include
21 driver's helper within helper and loaders?

22 MR. HACKER: Yes. Helper, yes. That's with the
23 helper.

24 THE COURT: Well, what is it that you want me to
25 add? Because the law, as I understand -- tell me what you

CHARGE CONFERENCE

23

1 want me to add first, then I'll address it.

2 MR. HACKER: Just as I read that those types of --
3 that those type of safety-related things, the dismounting of
4 vehicle in these circumstances is -- if these are part of the
5 duties of these people, then they would be drivers' helpers.
6 It's not just loading the vehicles.

7 THE COURT: Okay. As I understood your claim, you
8 were arguing that these plaintiffs were loaders. I never
9 understood you to be arguing that they were drivers' helpers,
10 so the only thing I addressed in the charge was with regard to
11 the loading issue. I mean, that's what you -- that's what I
12 understood from summary judgment papers and everything else.

13 MR. HACKER: But I think the evidence, Mr. Verderber
14 called them drivers' helpers. They all identified themselves
15 as helpers. Nobody identified themselves as a loader.

16 THE COURT: Okay.

17 MR. HACKER: It's a category. And to the extent
18 that there may have been some, you know, emphasis on loading,
19 I agree they did loading as well, but I think that to not have
20 the helper portion of that is wrong.

21 THE COURT: Okay. What's plaintiff's position on
22 this?

23 MR. LICHTEN: Well, I think the instruction as
24 written includes any act that involves a degree of judgment
25 and discretion in planning and building a balanced load or in

CHARGE CONFERENCE

24

1 placing, distributing or securing the pieces of freight in
2 such a manner that the safe operation of the vehicles will not
3 be jeopardized.

4 THE COURT: Well, yes, but that does have to do --
5 it gives the general description and specifically it's dealing
6 with the loading issue. What defendant is saying is that the
7 driver's helper is a different definition, and then that, too,
8 should be explained to the jury as a basis for exemption.

9 MR. LICHTEN: Well, as long as -- if the defendants
10 are asking that that whole regulation be --

11 THE COURT: Well, I'm not going to add the
12 regulation. I'll do something similar to what I did with
13 regard to the loaders, in terms of explaining it to the jury.
14 At the end of the day, what the law does say, that any such
15 task has to be a substantial part of their employment
16 activities.

17 MR. LICHTEN: Right.

18 THE COURT: So that part stays as is. Let me just
19 find where I have in the information.

20 MR. HACKER: I do have another comment on that as
21 well, Your Honor.

22 THE COURT: I'm sorry?

23 MR. HACKER: I have another comment on that.

24 THE COURT: Sure. Let me hear your comment.

25 MR. HACKER: The same regulation, if we go to part

CHARGE CONFERENCE

25

1 B, reads that an employee may be a helper under the official
2 definition, even though such safety-affecting activities
3 constitute but a minor part of his job, and they give the
4 example of an armored car.

5 THE COURT: I know what the statute says, but I'm
6 looking at Supreme Court case law and cases from other judges
7 in this court that have looked at the Supreme Court cases on
8 this issue as basically requiring conduct to be more than
9 simply de minimus.

10 MR. HACKER: That is correct. But maybe the
11 difference is there's a gap between de minimus, which is
12 trivial, casual, and a minor part of the job. In other words,
13 if I'm an armored car guard in the back, I have -- my job
14 mainly is to protect the money or the gold or whatever it is.
15 So a minor part of my job may be if we have to turn the
16 vehicle around, I get out and I help. That's different from
17 de minimus or casual, like --

18 THE COURT: You really do think getting out -- I'm
19 sorry. Go ahead, Counsel, I didn't mean to cut you off.

20 MR. HACKER: There is something between de minimus,
21 which I agree with if it's casual, you know, if I get out of
22 the truck at lunchtime or something, it doesn't make me
23 safety-related just because I'm standing near the truck. But
24 if I have a function that maybe only once every three weeks or
25 a month, you know -- but probably, frankly, with turning

CHARGE CONFERENCE

26

1 trucks around it's probably much more than that -- that I have
2 to get out. It's not my main function, it's mainly to load
3 and unload the trucks, but it is a minor part.

4 But what they tried to say is, I think, that if it's
5 a regular part of what you may be doing, even if it's a minor
6 part, that that should be considered. With de minimus, it's
7 sort of a once in a blue moon something happens that, you
8 know, wasn't even planned or required. That's de minimus.

9 So I know the case law, you are correct, obviously,
10 on that, but I think that this is the regulation. I don't
11 think it's been held to the --

12 THE COURT: Well, no, the cases interpret the
13 regulation. That's the problem. And so I have to go with the
14 case law, not with what the regulation says, ultimately. I
15 mean if the Supreme Court is saying this is what it means,
16 then I have to rely on the Supreme Court's determination of
17 what that meaning is.

18 MR. HACKER: Is that a question of fact?

19 THE COURT: It's a question of fact for the jury to
20 determine what is de minimus, but the Supreme Court in their
21 decisions have come down and said it has to be substantial, it
22 has to be a substantial part of the ordinary duties, and it
23 also cannot be de minimus.

24 MR. HACKER: I know there's a recent case -- I don't
25 have it in front of me -- with an armored car where, again,

CHARGE CONFERENCE

27

1 all they did was going out -- they were armored car guards and
2 they cited the regulation as it is even though they don't
3 regularly --

4 THE COURT: Who was citing that case? Which court
5 decided that case?

6 MR. HACKER: I don't have it in front of me, Your
7 Honor.

8 THE COURT: Well, do you know what level court? Was
9 it a District Court case or --

10 MR. HACKER: I believe it was District Court.

11 THE COURT: Yes. I mean, I'm looking at the Supreme
12 Court cases on this issue as to what exactly needs to be shown
13 to put this charge together. I'm happy to put in the
14 information with regard to the driver's helper, since what
15 you're saying is that that is a different prong of the
16 exemption that you're relying on. So tell me what you want me
17 to add with regard to that. I'm not going to add the
18 entire --

19 MR. HACKER: Again, I think, obviously, focusing not
20 so much on crossing railroad tracks, but the idea that they
21 would be involved in stepping out of the vehicle and helping
22 to make sure on a busy highway if they're coming in or out of
23 driveways or if there were breakdowns, that the safety of the
24 vehicle -- that they are involved in protecting the safety of
25 the vehicle.

CHARGE CONFERENCE

28

1 THE COURT: Can I see that statute?

2 MR. HACKER: Sure. Regulation.

3 THE COURT: Yes. What does it mean when it says,
4 Counsel, that this term does not include employees who ride on
5 the vehicle and act as assistants or relief drivers?

6 MR. HACKER: I think -- that I think they're
7 referring to they become drivers, not helpers. They become --
8 they fill in for the drivers. Again, if you look through
9 this, the section --

10 THE COURT: No, no, no. Counsel, the statute reads,
11 and I'm reading just looking at the plain language of the
12 statute: "A driver's helper is an employee other than a
13 driver who is required to ride on a motor vehicle when it's
14 being operated in interstate or foreign commerce."

15 And then it specifically says: "This term does not
16 include employees who ride on the vehicle and act as
17 assistants or relief drivers."

18 So you think that means regular drivers?

19 MR. HACKER: For example, it wasn't in his
20 testimony, but Astro, if it's a slow time and they have a
21 driver going out and he needs one assistant, they may have the
22 assistant as another driver who might relieve him. They might
23 have two drivers in the truck if it's a long haul. One's
24 driving, then the other one is driving. He's an assistant,
25 he's sitting up there.

CHARGE CONFERENCE

29

1 But if you look at the prior section, I think -- in
2 other words, it starts off -- I don't have it in front of me
3 anymore, but you say other than the driver. Someone who's
4 sitting there other than the driver is a helper. So it
5 implies that if an assistant who is a driver, then that would
6 not be under the helper, he'd be under the driver category.

7 THE COURT: A plain reading of this statute does not
8 say to me what you're telling me it says.

9 MR. HACKER: You have to look at the section before.

10 THE COURT: Okay. So you're now asking me to do
11 statutory interpretation, to look at multiple parts of the
12 statute to figure out what this statute says on its face.

13 MR. HACKER: What it says is that if you're not a
14 driver, if you're sitting there and you're not a driver,
15 right, then you're to be in the helper category. Then it goes
16 on --

17 THE COURT: Except that it's specifically defining a
18 driver's helper, which to me suggests someone who is there for
19 the purpose of helping the driver.

20 MR. HACKER: Right, right. And that's why it goes
21 on to explain what a driver's helper, what the category is
22 comprised of. The way you read it, then the helper is just --
23 not an exempt category, which is wrong. In other words, if
24 you're a helper --

25 THE COURT: You need to give me a case interpreting

CHARGE CONFERENCE

30

1 this. Your interpretation of this does not square with the
2 language of it. So unless you're giving me a case to tell me
3 what that says, I don't understand it to say that.

4 MR. HACKER: Well, what your interpretation is, that
5 if it's not the driver's --

6 THE COURT: Counsel, I'm not interpreting. I'm
7 reading the statute. I just read it. You're asking me to
8 read something into it.

9 MR. HACKER: No, I'm just asking for the language in
10 the regulation to be explained that that's part of the safety
11 operation.

12 THE COURT: I'm not going to put in examples. If
13 you want me to give a definition that's in the statute, that's
14 all I'll do, but I'm not going to put in examples of what the
15 conduct could be.

16 MR. HACKER: You did that for loading.

17 THE COURT: What do I have in here for loading,
18 Counsel?

19 MR. HACKER: Safety-related.

20 THE COURT: Right.

21 MR. HACKER: These are safety-related as well.

22 THE COURT: To be a driver's helper.

23 MR. HACKER: Yes. That's the whole gist of this
24 whole regulation. All four -- all four categories are
25 safety-related categories. These are very important

CHARGE CONFERENCE

31

1 safety-related categories. To just leave them out, say then
2 it's only loading, then what is a driver's helper? That's an
3 exempt category. There's nothing in your instructions that
4 would give them any guidance on that.

5 THE COURT: Well, Counsel, this is why submitting
6 jury charges with case law or whatever it is you're relying on
7 becomes helpful for me as a judge. This is not something you
8 cited to me before. And you're now asking me to read it and
9 to give it a certain interpretation, based on what you're
10 telling me, so that I can charge a jury on that.

11 MR. HACKER: I think, again, these are specific
12 examples of what a driver's helper does that were part of the
13 duties of these three individuals if the jury finds that.

14 THE COURT: Counsel, I'll do the research. I have
15 to make sure that what I'm charging to the jury is the law as
16 it should be. Okay. Go ahead. I'm looking into that issue.

17 What are your other objections?

18 MR. HACKER: They're very minor. On page 13 on the
19 top, I think -- it's the second full paragraph. I believe
20 there's a word left out. And that's, it says: "However, if
21 you find the plaintiffs had more than trivial
22 responsibilities," et cetera.

23 THE COURT: I'm sorry, on page 13 where?

24 MR. HACKER: Thirteen, five lines down.

25 THE COURT: Okay.

CHARGE CONFERENCE

32

1 MR. HACKER: So you've said that the defendant is
2 not liable. Then you say: However, if plaintiffs had more
3 than trivial responsibilities and tasks that affected motor
4 vehicle -- then you may find the defendant is liable. If they
5 had no more than trivial I think is what you were saying.

6 THE COURT: Correct.

7 MR. HACKER: And the only other comment, there's a
8 couple of places where you say safety operations. I would
9 just ask that be safety-related operations.

10 THE COURT: Well, I'm going, again, by the language
11 that's being used to describe this. You want me to change it
12 to what?

13 MR. HACKER: Just safety-related.

14 THE COURT: Well, I understand this to be a specific
15 term of art that's being used by the Court in terms of stating
16 safety operations, which is why I cite it that way. In fact,
17 I had it written another way and when I looked at the case law
18 and saw that specifically it's referred to as safety
19 operations I changed it back, or operation safety, whichever
20 one it is.

21 MR. HACKER: I like operation safety better than
22 safety operation. Sorry, Your Honor.

23 THE COURT: And which specific page are you
24 referring to?

25 MR. HACKER: On 13.

CHARGE CONFERENCE

33

1 THE COURT: Okay. Anything else, Counsel?

2 MR. HACKER: Just looking. I think that's it, Your
3 Honor.

4 THE COURT: I'm just going to look at the law on
5 that issue. (Pause.) I just re-read your charge and there's
6 nothing in there about any of this, Counsel.

7 MR. HACKER: That may be. The problem is the
8 testimony opened this area.

9 THE COURT: Well, Counsel, you're supposed to
10 prepare for your case in advance and know what your testimony
11 is going to show so you can suggest what the charge should be.
12 So to be asking me here to add a charge that you never
13 proposed based on a regulation without any case law to support
14 what that regulation means --

15 MR. HACKER: I think these are specific examples. I
16 think the regulation is clear. It even says in the regulation
17 something about that these helpers could also be loaders as
18 well, and then it refers you to the next section as to safety
19 of operation for loaders. So this is equivalent to the
20 section on loaders. It's not --

21 THE COURT: I'm glad you think that, Counsel, but
22 not giving me the opportunity, one, by proposing it; two, by
23 submitting law; and handing me a copy of the regulation in
24 court telling me what that regulation means is not how we
25 conduct trials.

CHARGE CONFERENCE

34

1 MR. HACKER: I apologize, but, you know, it is what
2 it is right now.

3 THE COURT: I appreciate that. But appreciate also
4 that I'm not going to sit here and accept what you tell me a
5 regulation means when I don't even -- I'm not familiar with
6 it. It's not something you suggested to me so that I even had
7 a chance to look at it. So I'm sitting here trying to find
8 case law on this so that I can figure out what is the
9 appropriate law I need to charge the jury on.

10 Do you know when that regulation was issued,
11 Counsel?

12 MR. HACKER: No, I do not. These regulations are
13 repeated year after year. It says, yes, it was 1971, amended
14 in 1972. It says 1971. It has 36 Federal Register 21788 --
15 778. Then there was an amendment.

16 THE COURT: Okay. I'm going to look at that and add
17 something. Are the parties ready to go?

18 MR. HACKER: Ready.

19 MR. LICHTEN: Can I have 15 minutes for lunch?

20 THE COURT: For?

21 MR. LICHTEN: Lunch.

22 THE COURT: You guys haven't had lunch?

23 MR. LICHTEN: No.

24 THE COURT: Okay. Have the parties looked at the
25 verdict sheet?

CHARGE CONFERENCE

35

1 MR. LICHTEN: Yes.

2 THE COURT: Are there any comments to the verdict
3 sheet?

4 MR. LICHTEN: No.

5 MR. HACKER: Well, yes.

6 THE COURT: Go ahead, Counsel.

7 MR. HACKER: This would relate to what we were just
8 talking about. Number 9 on page 3, has defendant proven that
9 plaintiffs worked with defendant as a helper or loader engaged
10 in safety operation?

11 THE COURT: As a helper or loader?

12 MR. HACKER: Just add "a helper or," yes. You have
13 "loader."

14 THE COURT: Yes. Okay. Anything else?

15 MR. HACKER: No.

16 THE COURT: Anything from you, Counsel?

17 MR. LICHTEN: No.

18 THE COURT: Okay, why don't you come back at 2:30.

19 (Lunch recess.)

20 (In open court outside the presence of the jury.)

21 THE COURT: I just wanted to show the parties what I
22 had in terms of the helper language. There's actually going
23 to be a fire drill at 3.

24 MR. HACKER: Are we exempt?

25 THE COURT: We can stay in the courtroom, but I

PROCEEDINGS

36

1 don't think we'll be able to hear anything over the alarm.

2 I've made all the other changes that the parties
3 suggested and this is just language that I added as to the
4 helper from the statute after looking at the statute and the
5 case law. Is there any objection?

6 MR. LICHTEN: No.

7 MR. HACKER: It's fine.

8 THE COURT: Okay. So we'll be ready to go.

9 (Jury enters courtroom.)

10 THE COURT: Ladies and gentlemen of the jury, I
11 apologize for the fact that you've been waiting all day to see
12 us and hear from us, but with the parties I had to work
13 through a number of legal issues, and sometimes it's just
14 unavoidable. So I really do apologize, but we are going to
15 now have the summations.

16 You will hear from plaintiffs' attorney first, and
17 then the defendant will go, and then plaintiff gets a brief
18 rebuttal. And then I'll charge you on the law and you can
19 deliberate.

20 At 3:00, there's going to be a fire alarm, so don't
21 get scared when it starts going off. And depending on how
22 loud it is, we may have to stop what we're doing and just wait
23 for the sound to stop. Okay, so please bear with us.
24 Counsel.

25 MR. LICHTEN: Good afternoon, ladies and gentlemen

SUMMATION - LICHTEN

37

1 of the jury, Your Honor, Mr. Hacker --

2 THE COURT: You have to keep your voice up or you
3 can wear the mic and Ms. Francis will help you.

4 MR. LICHTEN: I'll keep my voice up.

5 COURTROOM DEPUTY: I'll put it down here.

6 MR. LICHTEN: Plaintiffs believe that Mr. Godwin,
7 Mr. Griffin and Mr. Callace are all very credible and very
8 believable witnesses. But in this case, you can decide the
9 questions that you have to decide just by looking at the
10 defendants' case, because the defendants' evidence falls into
11 one of three categories: Either they admitted what we accused
12 them of; either they admitted at one time and denied at
13 another time what we allege; or that they denied it and the
14 denial is so weak that it, in effect, buttresses our claims.

15 Let's start with the allegation that they weren't
16 paid for all the hours that they worked. The defendants put
17 into evidence Defendant's Exhibit A, which they claim is the
18 time slips that the checks were based on, the paychecks were
19 based on. I defy anyone to look at this exhibit and to make
20 heads or tails of it and to figure out how much anyone was
21 paid and how many hours they worked during a particular week.

22 Let's examine this, though. How was this generated?
23 Mr. Verderber testified that he in his office at 6 a.m. looked
24 to see who came in at what time and then he noted it on this
25 document, what time they came in.

SUMMATION - LICHTEN

38

1 Now, Mr. Verderber is the chief executive officer
2 and the president of this company, which has up to at least
3 50, maybe 70 employees, has 20 and 30 helpers, drivers. He
4 has like a dozen trucks that have to come in and go out. He's
5 making all kinds of assignments, making all kinds of decisions
6 early in the morning. And it's just impossible --

7 (Fire alarm.)

8 THE COURT: Sorry, Counsel.

9 MR. LICHTEN: Should I continue?

10 THE COURT: Yes.

11 MR. LICHTEN: If Mr. Verderber was standing by the
12 front of the building --

13 (Fire alarm.)

14 THE COURT: I think that's the end of it. Marshals,
15 is that the end of it?

16 THE MARSHAL: That's the end of it, Your Honor.

17 THE COURT: Okay, thank you. You can proceed,
18 Counsel.

19 MR. LICHTEN: As I was saying, Mr. Verderber wrote
20 down the times people came in, supposedly, when he saw them
21 first thing in the morning. Given his responsibilities and
22 his job as the head of the whole company, there's no way that
23 he could do that with any accuracy. If he sat by the front
24 door of the building --

25 (Fire alarm.)

SUMMATION - LICHTEN

39

1 THE COURT: They're announcements only. That's it.
2 Go ahead.

3 MR. LICHTEN: If he sat in front of the building and
4 took down nothing other than when people came and what time
5 they came at and who came, it still would be tough for him to
6 make an accurate representation of when people's day started.
7 But doing it as he said he did it, by sitting in his office
8 and waiting until he saw people either walk in or walk by his
9 office --

10 THE COURT: Slow down, Counsel.

11 MR. LICHTEN: Doing it that way, there's no way that
12 this is an accurate portrayal of when people started their
13 day. If he didn't see someone for an hour, then they don't
14 get paid for that hour? If he didn't see someone at all, then
15 they don't get paid for that day? That's not the way it's
16 supposed to work. When they come to work, they're supposed to
17 get paid starting the first minute they come to work.

18 The time-outs, the testimony as to how the time-outs
19 were recorded is even more mystifying, because he wasn't there
20 after 5 or 6 o'clock in the evening. He said he relied on
21 someone else to tell him when the employee left that day. So
22 this has the added error that's built into the system of
23 relying on a third party or someone else to tell him when that
24 person left.

25 Most companies or some companies, at least, of this

SUMMATION - LICHTEN

40

1 size have a punch clock or they have a sign-in system or they
2 have an ID card that you can put in front of a ray or they
3 have a fingerprint system or thumbprint or something. And
4 actually, this business has it, too. The witness this morning
5 testified that they have a punch clock system for the people
6 in the back office. And that's a much more accurate system
7 and it's much more easy to figure out how many hours someone
8 worked compared to this. Why didn't they use the punch clock
9 system instead of this? I don't know. It would have made a
10 lot more sense.

11 If you look at this document, and I urge you to look
12 at it carefully and look at all the different pages, there's
13 things scratched out. There's apparently things whited over.
14 There's things crossed out. There's numbers written over
15 other numbers. It's hard to read. It's hard to figure out
16 whose hours are being talked about.

17 There's also the issue of lunch that was raised
18 during the testimony. And lunch is apparently deducted under
19 the column that's entitled "deduction." Sometimes it's minus
20 a half, sometimes it's minus one, sometimes it's minus one and
21 a half, minus two. Sometimes there's nothing written there.

22 The lunch also has to be accurate. If the person is
23 not paid for lunch, then Mr. Verderber would have -- or at
24 least someone would have had to have seen the person leaving
25 for lunch and when they come back from lunch. In a punch

SUMMATION - LICHTEN

41

1 clock system, if you're not being paid for lunch you punch out
2 when you leave for lunch and you punch back in when you come
3 back. That's not this system.

4 And Mr. Godwin explained very simply, very easily
5 why the lunch issue doesn't solve this problem. Because even
6 if a half an hour was deducted for each day and you worked
7 five days in a week, that's only two and a half hours. And
8 the discrepancies between the time, the period -- the hours
9 that people worked and the hours that they were paid for was
10 much more than two and a half.

11 And furthermore, Mr. Godwin testified that very
12 often he didn't even get lunch. He ate -- he worked his way
13 through lunch, he ate lunch on the run, and so he didn't get
14 his half an hour. And there's no way that Mr. Verderber would
15 know whether or not he got -- the people got the half an hour
16 that they were supposed to get if he wasn't there and he
17 didn't see them and they didn't punch in or punch out or any
18 reliable method of showing their time.

19 Now, even on its own terms, even if you accept this
20 document as accurate, the hours don't add up. I urge you to
21 look at -- you can pick a week at random or you can pick a
22 week that I picked right at the beginning of Mr. Callace's
23 job, the period he worked for Astro, the week of August 4th,
24 2009. If you look at Plaintiff's Exhibit 10, which are the
25 information that was on the pay stubs, he was paid for 51 and

SUMMATION - LICHTEN

42

1 a half hours that week. Actually, he was paid for 36 and a
2 half hours for August 4th, 2009.

3 Let's look at August 4th, 2009. He was paid for 36
4 and a half hours that week. But if you look at Defendant's
5 Exhibit A for the days that went into that check, July 25th,
6 27th, 28th, 29th, 30th and 31st, he worked 53 and a quarter
7 hours. So that's 17 hours that he wasn't paid for even if you
8 accept their documents.

9 The next paycheck, August 18th of 2009, two weeks
10 later, he was paid for 51 and a half hours. And if you check
11 their document, Defendant's Exhibit A, and you look at the
12 days of the week that went into determining that paycheck, he
13 actually worked for 56 and a half hours. So he wasn't paid
14 for five hours.

15 So even by their own standards, by their own
16 documents, by their own evidence, as I said at the beginning,
17 they weren't paid the number of hours that they were supposed
18 to be paid.

19 Their response to all this is, well, if you weren't
20 paid the hours that you worked, you can complain, you can go
21 to Mr. Verderber. And they have a whole system set up where
22 you can go to Mr. Verderber. You can't go to him between the
23 hours of 6 and 8, because then he says he's a little bit
24 rough, but if you go to him the other hours and you complain
25 about it, then they'll look at your complaint and they'll

SUMMATION - LICHTEN

43

1 decide. And there's actually a person who came in today, the
2 witness said her job is to issue the checks to people who come
3 in and successfully argue that they weren't paid the right
4 amount.

5 But, again, it's not up to the workers to figure out
6 how much they worked, how many hours they worked. They're not
7 supposed to keep the records. These are people who are
8 getting paid for providing physical labor. They're paid for
9 using their backs and their arms and their legs. They're not
10 supposed to have a degree in accounting or bookkeeping.
11 They're not supposed to keep track of all their hours. It's
12 the employer's job to keep track of the hours. And this
13 employer didn't do that, didn't do that with any type of
14 accuracy, didn't do that with any type of effort to make sure
15 that the hours were correct.

16 I believe and the plaintiffs calculate that in the
17 case of Mr. Griffin, he actually worked for Astro for 134
18 weeks total time that he worked there. And if you take it
19 about six hours a week, on average, like he said he thought he
20 was out, that's about -- that's 800 hours if you multiply that
21 by the number of weeks, and it's approximately \$10,000 at his
22 rate of pay. That's how much he believes he's out for the
23 period of time due to the fact that he wasn't paid for all the
24 hours that he worked.

25 For Mr. Godwin, he worked for Astro for 38 weeks.

SUMMATION - LICHTEN

44

1 That was his total time that he worked there, 38 weeks. If
2 you take it seven hours a week, that equals 266 hours, and at
3 his rate of pay, which was \$12 an hour, that's about \$3,000
4 that he thinks he was out because he wasn't paid for all the
5 hours he worked.

6 And for Mr. Callace, who worked there for 69 weeks
7 during this period of time, at five hours a week, on average,
8 he was not paid for the time that he worked, that totals to
9 about 345 hours, and that's \$5,000 that he thinks that he was
10 out because he wasn't paid what he worked.

11 And it would be hard for a worker in any
12 circumstance, but particularly in this circumstance, to make
13 the complaints that the defendant says they should have made
14 and that they would have been reimbursed if they had.

15 Mr. Callace testified that when he got there, right
16 in the first few weeks, the checks that I was talking about
17 right around that time period, he went to Mr. Verderber and
18 Mr. Verderber said, well, come back next week. And he came
19 back the next week and he still wasn't paid.

20 Mr. Godwin said, you know, he just started on the
21 job, he was relatively new, he didn't want to lose the job, he
22 didn't want to get yelled at, he didn't want to get fired, so
23 he didn't complain.

24 Mr. Griffin said he complained and got nowhere.

25 But a system shouldn't rely on complaints. It

SUMMATION - LICHTEN

45

1 should be accurate. It should give people the time that they
2 work, the pay for the time that they work, and they shouldn't
3 have to come every week and complain and make a formal
4 complaint and challenge the boss in order to get paid. That's
5 not the way this is supposed to work.

6 There's also a question that you'll be asked, was
7 this willful? I believe that if anyone doesn't pay someone
8 for the time they worked that that's willful in and of itself.
9 It's not a mistake. If they don't keep accurate records and
10 they know their records aren't accurate and they have a whole
11 system set up. They asked, well, how often do people come in
12 and challenge their time? And the witness today said, well,
13 once a month maybe. Mr. Verderber said he couldn't calculate
14 it.

15 This is not the way that you get paid in America.
16 They're supposed to pay people what they work for and anything
17 else is a willful violation of the law, the law of the state
18 of New York, and also the law, the federal law, because you're
19 entitled to be paid a minimum wage under federal law, and if
20 you're paid nothing that's obviously less than the minimum
21 wage. So you're entitled to be compensated for all the hours
22 that you worked that you weren't paid for. And it's up to you
23 to figure out what that amount is, based on the testimony,
24 based on the evidence, based on the documents.

25 The next area of the case that I want to talk about

SUMMATION - LICHTEN

46

1 is the overtime. Now, Mr. Verderber said that in the industry
2 we're exempt, we don't have to pay overtime. I tell you that
3 the statement of the law that you have to go by is the law as
4 the judge tells it to you. That is the law that governs, not
5 what Mr. Verderber says. I would submit to you that even if
6 it wasn't a violation of your oath to not follow the law as
7 the judge says, I think it makes a lot more sense that the
8 judge knows what the law is more than Mr. Verderber.

9 It's not the case that the law is that the whole
10 moving industry is exempt. I don't even think Mr. Verderber
11 believes that. The rule is that if these people did a job
12 that involved judgment and discretion involving safety, such
13 as deciding where to put items on the truck so that the truck
14 doesn't tip over, that that makes them exempt because they're
15 covered by another law and not covered by the overtime law.

16 And in that case, Mr. Verderber said that these
17 workers do decide safety issues, that they do load the trucks
18 and that they decide where on the trucks the boxes go.

19 At an earlier time, at his deposition, before he
20 probably realized that the truth is not in his interest, he
21 said the exact opposite. He said that the drivers load the
22 trucks, the drivers decide where the boxes go, and the helpers
23 are merely workers who are supervised by the drivers and who
24 the drivers tell exactly what to do.

25 And that's the case. That's what the actual reality

SUMMATION - LICHTEN

47

1 is. And it makes sense, because, otherwise, why would drivers
2 be paid more than helpers? Why would drivers be higher up in
3 the hierarchy? Why would helpers be supervised by drivers?
4 Drivers are the ones who decide the safety issues. They're
5 not -- they're exempt, they're obviously exempt. The helpers
6 are not exempt. The helpers have to be paid overtime if they
7 work more than 40 hours.

8 Now, Mr. Verderber testified that sometimes he gives
9 overtime when they work less than 40 hours. And it's his
10 theory or his philosophy that if he gets paid more for a
11 certain job, the workers should get paid more for a certain
12 job. That may be magnanimous of him, but it's not the law,
13 because if they work more than 40 hours in a week, no matter
14 what they get paid for less than 40 hours a week, when they
15 work more than 40 hours in a week they have to get paid time
16 and a half.

17 And you can look at Plaintiff's Exhibits 8, 9 and
18 10, which are the time records for each of the plaintiffs, and
19 you can see for yourself that there are weeks in which they
20 worked more than 40 hours, where they worked 45 hours, where
21 they worked 50 hours, where they worked 55 hours, and they
22 were paid the regular straight time hourly rate for the entire
23 period of time. They weren't paid time and a half.

24 And you can calculate almost precisely if you do
25 the -- if you take the time and do the math how much each

SUMMATION - LICHTEN

48

1 person is owed for overtime, because if you look at the weeks
2 that they worked more than 40 hours and you take the excess
3 over 40 and you multiply that by half of their hourly rate,
4 you get exactly what they're owed.

5 And for Mr. Griffin that amount is 109 hours, at his
6 rate of pay that equals \$705.75; Mr. Godwin, who worked 64
7 hours of overtime without getting paid time and a half, that
8 equals \$382.50; and Mr. Callace, who worked 483 hours of
9 overtime without getting time and a half, that equals
10 \$3,622.50.

11 And, again, you're going to be asked whether this is
12 willful. These days, I think it's almost every employer
13 should know that his workers get time and a half. Mr.
14 Verderber's statement of what he thought the law is is so off
15 base that I don't think you can even believe that he thinks
16 that's what the law is. It's not what the law is. The law is
17 as the judge tells you what it is. And I think that Mr.
18 Verderber willfully ignored the law when he refused to pay
19 people overtime the time they worked over 40 hours.

20 These people are helpers. They move boxes from
21 place to place. They don't decide where it goes on the truck.
22 If they put the boxes on the truck as they testified to, then
23 the supervisor is the driver. And the driver tells them
24 exactly where to put it, exactly where in the truck it goes,
25 and he decides the safety issues, because in the end he's

SUMMATION - LICHTEN

49

1 going to be the one responsible for it.

2 Now, the next issue is the discrimination claim, and
3 in this claim you're going to have to use your own
4 determinations as to what the credibility of the witnesses
5 were, who is telling the truth and who isn't telling the
6 truth. Our contention is that Mr. Griffin and his ex-fiancee,
7 Ms. Barnett, were telling the truth, and that Mr. Verderber,
8 when he denied making those statements, was not telling the
9 truth.

10 It's not hard to believe that Mr. Verderber, who
11 referred to Ms. Barnett as a girl, uses demeaning language
12 when he refers to certain groups of people. He admitted that
13 he made assignments for a multi-day job for moving and on the
14 last day he changed the assignment. He denied it was for
15 racial reasons, but Mr. Griffin testified that he thought it
16 was and he based it on Mr. Verderber frequently using racial
17 slurs. I don't think Mr. Griffin would make that up, but it's
18 up to you to decide who's telling the truth.

19 Mr. Griffin estimated that the amount of tips that
20 he didn't get because of these discriminatory policies totaled
21 about a thousand dollars. Mr. Godwin, who worked there maybe
22 a quarter of the time that Mr. Griffin did, that would equal
23 maybe \$250. That's what they figure they were out because of
24 the discriminatory assignments.

25 You're going to be asked if you believe that the

SUMMATION - LICHTEN

50

1 plaintiffs are entitled to punitive damages. You have to find
2 that there was malice or a reckless disregard for the
3 plaintiffs' rights. We would contend that any time that you
4 use the language that Mr. Verderber used and that you
5 discriminate on the basis of race that that would be
6 malicious, that would be a reckless disregard of plaintiffs'
7 rights. There's no way that that could be an accident.
8 There's no way that that could be inadvertent.

9 We believe that, in your estimation, however much
10 you believe is the right amount, they should be entitled to
11 punitive damages.

12 And finally, maybe not -- last but not least, we
13 have the criminal conviction discrimination claim, which is
14 the heart of the matter.

15 As a threshold issue, Mr. Verderber said that he
16 never fired Mr. Griffin, that he was not discharged, that he
17 voluntarily quit. But Mr. Verderber admitted that he told Mr.
18 Griffin that he had no work for him, because of the
19 circumstances that he couldn't give him any work on any of his
20 moving jobs, that he only pays people for the work that they
21 do, so he couldn't pay him. And then he didn't deny that he
22 told Mr. Griffin to leave the premises, or Mr. Griffin said,
23 in a more colorful way, get the fuck out of here.

24 Now, if there's no work for Mr. Griffin and there's
25 no pay for Mr. Griffin and he's supposed to leave the

SUMMATION - LICHTEN

51

1 premises, that seems to me all the elements of discharge have
2 been established. It seems to be a firing to me.

3 And even Mr. Verderber admitted that several weeks
4 later he told the Department of Labor that Mr. Griffin was, in
5 fact, fired, was, in fact, fired because he failed a
6 background test, and that there would be no difference between
7 him saying that Mr. Griffin quit and Mr. Griffin was fired.

8 And I agree, there is no difference. Mr. Griffin
9 was fired. And even if you don't find that he was fired at
10 that point, Mr. Griffin, according to Mr. Verderber, would
11 have been fired anyway if he had had the guts to come back to
12 the facility and show up again for work. He would have been
13 fired in any event.

14 So Mr. Griffin was fired. Mr. Verderber even, when
15 I asked him about Mr. Godwin's firing, answered about Mr.
16 Griffin's firing by accident, and so even he acknowledged that
17 Mr. Griffin was fired. We contend that there's no difference
18 between whatever happened to Mr. Griffin and being fired.
19 It's a discharge no matter how you look at it.

20 Mr. Verderber talked about other companies, what
21 they wanted, what they told him they wanted. The judge will
22 instruct you that that's irrelevant. I mean, if it's against
23 the law, it's against the law, whether your other companies
24 who are your -- that you're their agent or you work with them
25 or you have a contract with them or whatever the relationship

SUMMATION - LICHTEN

52

1 is, if that other company wants you to break the law, you
2 can't just go ahead and do what they want. You can't break
3 the law and say, they told me to do it. You have to be
4 responsible for what you did.

5 Now, let's see if they really did break the law.
6 The law in New York, as the judge will tell you, is that in
7 general, you can't fire someone with a criminal record unless
8 it's directly related to or there's a direct relationship
9 between the crime itself and the job that you're being fired
10 from. Now, what is this job that they're being fired from?
11 They're helpers, they're drivers' helpers. They move boxes.
12 They do physical labor. They move boxes from here to there.
13 They do go into people's homes, but they only go into people's
14 homes for a short period of time, to pack things up, to put
15 them on the truck and to take them out.

16 There's no significant contact with children. If
17 you're familiar with the nature of child abuse, the fact --
18 the chances of someone being abused as a child in the few
19 minutes that the workers are in the home taking out furniture,
20 taking out boxes, heavy items, is not reasonably likely to
21 occur. If they can't do this job, then they can't do any job.
22 I mean, these are the jobs that people with criminal records
23 should be able to do and not have to be fired and not have to
24 explain about their past.

25 The past was a long time ago. They did their time.

SUMMATION - LICHTEN

53

1 Mr. Griffin spent ten years in jail. Mr. Godwin spent seven
2 years. That's significant time. It's hard time. And once
3 they do, once they've paid their debt to society, that should
4 be the end of it. Then they should be able to get jobs unless
5 there's a direct relationship. There is no direct
6 relationship here.

7 If they were convicted of embezzlement and they
8 wanted to be a treasurer of a company, that would be a direct
9 relationship. If they were charged with fixing horse races
10 and they wanted to be in the horse racing business or if they
11 were charged with securities fraud and they wanted to be a
12 stockbroker, those would be direct relationships. Those would
13 be jobs that they could be kept from if they wanted to be
14 employed. But not this job, not this crime. This crime has
15 nothing to do with moving, it has nothing to do with physical
16 labor, and it has nothing to do with carrying heavy boxes.

17 What the law says -- and the judge will tell you
18 this -- is that each individual person, when the employer is
19 deciding whether or not to fire them, they must take into
20 account a certain number of factors, to balance them out and
21 to take that into account in deciding whether there's a direct
22 relationship.

23 I asked Mr. Verderber if he did that. I asked him
24 if the first factor if he took into account the New York State
25 policy governing hiring people with criminal convictions. And

SUMMATION - LICHTEN

54

1 he looked at me like I was speaking another language. That's
2 the first thing you have to take into account when you're
3 deciding whether or not there's a direct relationship between
4 the crime and the job. He didn't do that.

5 He didn't ask Mr. Godwin or Mr. Griffin about their
6 efforts at rehabilitation or their efforts to establish a new
7 life or what their circumstances were, their personal
8 circumstances. He didn't ask about rehab, and that's one of
9 the -- you have to make an individualized -- personal
10 individualized assessment of each person. You can't just have
11 a rule that says, well, if someone's convicted of a felony or
12 someone's convicted of a sex crime, then they're out. That's
13 not the law.

14 You have to take into account each individual
15 person's circumstances, and Mr. Verderber admitted he didn't
16 do that. He got the background report, based -- for Mr.
17 Godwin. He said, that's it, he hasn't worked here that long,
18 I'm firing him, I'm not taking anything else into account.

19 As for damages on that claim, both Mr. Griffin and
20 Mr. Godwin made about \$18,000 a year. Mr. Godwin hadn't
21 worked there a year, but he was working, if you extrapolate it
22 out over a year, he made \$18,000. They both got unemployment
23 insurance benefits, which cover about half your income for two
24 years. Mr. Griffin testified that he earned about 10 or 12
25 thousand dollars in the period of time since he was fired.

SUMMATION - HACKER

55

1 And you can also bring these damages forward. If
2 you find that they would have worked at Astro for time in the
3 future, then you can give them damages for the future lost
4 pay. That's called lost front pay. I'll let you decide how
5 much you think that the compensatory damages are worth. The
6 back pay is only a part of it. Part of is also mental and
7 emotional distress. Mr. Godwin and Mr. Griffin both
8 testified, I think very movingly, about how this whole episode
9 left them, how it affected them, how it hurt them.

10 Again, if we want criminal convicts to work in the
11 workforce at all after they get out of prison -- and the New
12 York State Legislature has said that we do -- then a job where
13 they're carrying boxes in and out of offices and carrying
14 boxes in and out of trucks should be a job that we can have
15 them do. Once they do their punishment, once they do their
16 time, once they pay their debt to society, that should be the
17 end of it and they shouldn't be punished any more.

18 I ask you to find for the plaintiffs in this case.
19 I thank you for your attention, thank you for waiting around
20 all this time, thank you for listening to me.

21 THE COURT: Thank you, Counsel.

22 MR. HACKER: May it please the Court, Mr. Lichten,
23 ladies and gentlemen of the jury, I just want to thank you
24 again for your attention. It's been long days, and we all
25 appreciate that. You listened to all the witnesses and now

SUMMATION - HACKER

56

1 we're coming to the -- can you hear me, Your Honor?

2 THE COURT: Very faint.

3 MR. HACKER: I'll speak a little louder. It's just
4 that my throat is a little sore.

5 Now we come to the point where you have some
6 decisions to make. In a few minutes, I believe the Judge will
7 tell you the law and, as she's already explained to you, it's
8 your job to decide the facts.

9 Obviously, we don't see this case at all the way Mr.
10 Lichten sees this case. First off, he starts off by telling
11 us that you don't have to believe my clients, he says, just
12 look at the other side, right, look at what they've done.

13 Well, I ask you to do the same. That big book, you
14 will have it available. Do look at it. If you have any
15 questions, there's a lot of stuff in there.

16 And is the suggestion being made that Mr. Verderber
17 was keeping these records on a daily basis in order to cheat
18 the workers out of their time? What business are these people
19 in? Mr. Lichten just said, why don't they have a punch card
20 where they can punch in and out for lunch? Hello, they're
21 moving. They're out in New Jersey, in Queens, in Brooklyn.
22 How are they punching in and out? They're coming in at 11:00
23 at night, 1 in the morning. Punching in and out?

24 The man in charge, the driver or one of the senior
25 helpers reports the time, reports his time or her time,

SUMMATION - HACKER

57

1 reports the other people's time. So unless he's cheating
2 himself and saying, well, we got in at 8:00, but they really
3 got in at 10:00, it doesn't make any sense. And if you look
4 at the book, you'll see that it's grouped by truck. So that
5 each group in each truck is checking in when they check in,
6 but usually checking out at the same time unless somebody had
7 to leave early.

8 So all of this is documented. I think one of the
9 first things you should ask is what is each of these
10 plaintiff's evidence that he wasn't paid for hours he worked.
11 Each one of them simply said, hey, I wasn't paid about five
12 hours a week every week, maybe six hours, maybe seven hours.

13 When I asked specifically, I asked Mr. Callace and I
14 showed him the first week, then he said, well, maybe it was
15 the second week or the third week, I'm not sure. It was
16 something like that.

17 Mr. Godwin didn't know any of this. He said he had
18 some notes. We haven't seen those notes. If he was afraid to
19 talk to Mr. Verderber, whatever he was worried about, losing
20 his job, that may or may not be, but he didn't talk to Mr.
21 Verderber.

22 And we have testimony from Laura Smith, who's worked
23 there 22 years, that it's rare but when people come in and
24 they ask for an adjustment, they get an adjustment. And
25 there's even on Mr. Griffin's paychecks in the very early --

SUMMATION - HACKER

58

1 you'll see payroll adjustments where he got extra money paid
2 to him because there must have been something missing before
3 everything became regular.

4 Remember, some of these men didn't work every day.
5 Sometimes something gets missed. So there's no doubt that
6 there could be a mistake sometimes, but it's now being
7 suggested this is a pattern. It's not an accidental mistake
8 if every week you're getting five or six hours less than you
9 should have gotten. And I ask you, do you believe that these
10 men came there, got these jobs, were given these jobs, and
11 then were cheated regularly on their hours? Why?

12 Mr. Callace came there, he said, I want \$15 an hour.
13 I haven't worked here in years, but I know what I'm doing, I
14 want \$15 an hour, which in the moving business is pretty good.
15 And did he get \$15 an hour? Yes.

16 Then we have Mr. Griffin comes in. Somebody else
17 who works there recommends, hey, Tra, come on over, you can
18 get a job at Astro. He'll hire you. He does that. Does he
19 get a job? Yes. He has no experience. He's got a criminal
20 record, which, again, there's some dispute now. Mr. Griffin
21 for most of the trial was saying, including to his own
22 attorney, he told him about his criminal record, never about
23 the specific criminal record; but then at one point when I
24 asked him, it was convenient to say, oh, no, I told him about
25 it, it was sexual abuse.

SUMMATION - HACKER

59

1 And yet, knowing that, this racist, Mr. Verderber,
2 invited him to his house with his children there, his wife.
3 Mr. Godwin testified he and Mr. Griffin were at the house on a
4 number of occasions alone with Mrs. Verderber. Is that the
5 behavior of a racist? Is that the behavior even of somebody
6 who knows that these two men are rapists, sexual offenders, at
7 home alone with your wife?

8 Maybe it is. If it is, it's because even Mr.
9 Griffin said, he trusted me. He was one of his most trusted
10 people, Tra Griffin. He worked well and after about -- he was
11 there two and a half years and he received a raise about 18
12 months in. That's not bad. He was making \$14 an hour, a
13 dollar less than Mr. Callace, the very experienced man who was
14 an assistant warehouse manager making \$15 an hour. So now
15 he's making \$14 an hour.

16 Is that discriminatory? Think about this. Why are
17 you here? You're a jury. You're here to use your judgment.
18 I'm only asking you to use your judgment. Is that the thing,
19 that somebody would hire you, give you a raise, trust you and
20 then cheat you? And then when you ask him, as he says he did,
21 to correct the mistake, he tells you to get out of here with a
22 few expletives.

23 Are those consistent is what I'm asking you? If I
24 did one, would I also be doing the other? That's what you as
25 jurors have to decide, because there's nobody else to tell us.

SUMMATION - HACKER

60

1 We have no evidence whatsoever that any of these three men
2 were not paid for hours they worked. There's no evidence.
3 They say -- and the average. They say it's their word. Now,
4 so Mr. Lichten apologizes -- I have to take a sip of water
5 every so often, I'm sorry.

6 Mr. Lichten says, look at the book, that book,
7 there's no way that Mr. Verderber could have kept track of all
8 those things. Well, he's the big shot, he's the CEO. The
9 truth is that was his job. That was how he knew that this guy
10 is here and he has to go on that truck. Oh, this guy didn't
11 show up today, what do I do? I need somebody else. I have to
12 call someone or I have to get somebody who's here and assign
13 them.

14 This is what he did. This is why from 6:00 to 8:00,
15 don't come near him. Don't ask him questions at 6 in the
16 morning when he's trying to get all the trucks out. If you
17 have an issue, wait. Talk to him in the afternoon. I don't
18 think that makes him a racist. I don't think it makes him a
19 cheater. But, again, this is for you to decide.

20 So, again, what was the procedure? You'd come in,
21 you'd walk by, he'd acknowledge your presence, he would make a
22 notation. Listen, he's not a time clock, that's true. And
23 when he put down 6:00, could it have been 6:02 or 6:03?
24 Probably. Could it have been 5:58? Probably. If some of you
25 do punch time clocks and if you get -- I'm sure very few of

SUMMATION - HACKER

61

1 you get in exactly at the time you're supposed to be in, but
2 if you're supposed to be in at 9:00 and you get in at 8:57, is
3 that overtime? And I hope your employer if you get in at 9:02
4 doesn't say, well, I'm docking you two minutes.

5 So a time clock is there, but Mr. Verderber was
6 trying to keep track in general. And if you look in the book,
7 you'll see some people in at 6:30, some at 7. Now, it's true
8 he doesn't say 6:36. I don't think -- I could be wrong, I
9 don't think he has that.

10 So yes, there's a record. And for Mr. Lichten to
11 say there's no record of anything, you can say that the
12 records are inadequate and, therefore, you can believe these
13 three men, no matter what they say they lost in time they lost
14 it. We're entitled to the money because we say so.

15 Now, I guess the other point is if this was so
16 widespread, then I don't know why there aren't 40 employees
17 here. I don't know why Mr. Verderber has any employees,
18 because, frankly, I ask you folks, would you work -- it's one
19 thing if there's a little mistake. Would you work for a
20 company if every week they cheated you five or six hours,
21 every week? And if you went there once or twice or three
22 times, you were cursed and thrown out of the office, like get
23 out.

24 Would you work there and would you recommend your
25 friend to come there, because, remember, Mr. Griffin was there

SUMMATION - HACKER

62

1 for a year and a half or so when he invited Mr. Godwin to join
2 him. He said, hey, come on over, it's a good place to work.
3 That's an odd thing to say, isn't it, if you've been cheated
4 every week, or at least say to the guy, hey, listen, watch out
5 for this guy, he's going to cheat you. I didn't hear any
6 evidence of that.

7 Frankly, if you listen to Mr. Godwin, you know, he
8 was fairly -- I would say of the three, much more credible.
9 He said, I don't really know. You know, it seemed like I was
10 missing something. When I said, could it be because you
11 didn't -- the lunch and all that, he said, well, maybe that
12 was it. And it could be that he didn't think about it the
13 same way that the employer does, because when the employer
14 sends you out, he says, you are entitled to lunch, I want you
15 to take lunch.

16 Now, if for whatever reason, because you guys want
17 to come back and you don't take lunch, he has no control over
18 that; but he doesn't know that and he can't pay you for that.
19 You're supposed to take lunch. The law requires you to have
20 lunch and he deducts for that. That's not what they're
21 talking about, is it? I don't think that's what they're
22 talking about.

23 The other thing I think is interesting -- again, you
24 may disagree with me -- if you look at the hours -- now, they
25 have two different claims. One is for overtime, because

SUMMATION - HACKER

63

1 they've had so many hours more than 40, and the other one
2 they're saying, well, we didn't get all our hours. So now we
3 have an employer -- and, again, I've worked many years myself.
4 I question. Use your experience. If I were an employer
5 looking to cheat my workers out of time, would I put down 58
6 hours instead of 62 hours? Oh, I'm not going to give him
7 those four hours, I'm going to give him 58 hours. Or would he
8 have probably said 40 hours? Then I don't have any issues
9 with overtime. I'll just show 40 hours, whatever you worked.

10 If you show 58 hours and 57 hours and 61 hours, that
11 tells me something. It tells me that he's putting down all
12 the hours that he knows of. He's not looking to cheat you.

13 And, again, Mr. Callace, you look at his hours. He
14 goes on these jobs. He's out 11 and a half hours. They
15 deduct for some time for a meal, but he gets paid. He gets on
16 some of those jobs overtime, time and a half, 22.50 an hour.
17 Now we're getting up there. Not so bad for someone with a
18 high school education. And that's his job. There's no
19 particular skill, he tells us.

20 Now, that's -- I'll get to that in a minute, but I
21 just want to make clear that if there are errors, they are
22 minor errors. If there are minor errors, as Ms. Smith has
23 said, there's a procedure. You go talk to Mr. Verderber, he
24 checks it, he looks in that book.

25 Now, I think it's not fair that Mr. Lichten said you

SUMMATION - HACKER

64

1 look in the book and you won't be able to make sense of
2 everything. And you know what, he's probably right. Because
3 when I looked at the book, I couldn't make sense of
4 everything, because I didn't know what a Rule 19 is and I
5 didn't know what a SID is and I didn't know a lot of the
6 terminology. But that's not the standard, is it? Mr.
7 Verderber knows what those things mean. Ms. Smith knows what
8 they mean. She told you sometimes she has to look at certain
9 things. She knows what she's looking for. That book is a
10 record for people in that company. It's not just for -- it
11 wasn't done for this lawsuit.

12 Are there some erasures or corrections? Well, what
13 does that say? He's a cheater or maybe sometimes you make a
14 mistake. You ever write something down and you have to erase
15 it, because your mind just wandered and you wrote the wrong
16 thing and you say, oh, gee, and you erase it. Is that a sign
17 that you were lying or telling the truth? So that's another
18 point. All right.

19 Let's talk about overtime, because that is a little
20 complicated and the judge will explain it in detail, but this
21 is a little different because we're a motor carrier. This is
22 a moving company and they are under certain different
23 regulations. And Mr. Verderber told you that in his industry,
24 there is a standard where if you're an interstate -- we're not
25 talking about a local delivery truck.

SUMMATION - HACKER

65

1 But if you're an interstate mover, as this company
2 admittedly and undisputedly is, then your workers do not get
3 overtime just because it's 40 hours. It's just not -- it's
4 not done. It's not legally required. It's an exemption.
5 Just like if any of you have a job where you are technically
6 an administrative person and you might work 50 hours a week
7 and the boss says thank you, doesn't pay you extra time,
8 because of the nature of your job. I'm a lawyer. I can work
9 a hundred hours a week. I'm not going to get anything extra,
10 because that's the nature of my job. That's fair.

11 And these workers understand that. But they do get
12 a pretty decent wage, right? They're not coming in at 7 and a
13 quarter an hour. They're coming in at 12. Now, Mr. Godwin
14 had been working in heavy construction, \$9 an hour. Now he
15 comes to this job, which I understand is a hardworking job,
16 but he's already up to \$12 an hour. So he's already getting a
17 three-dollar-an-hour raise at this job.

18 But overtime is a little different. In other words,
19 Mr. Verderber is not stupid. If he was trying to do something
20 improper, he's going to list 50 and 60 hours on the record
21 official time and not mark overtime. Only if he understands
22 in his experience, based on the law as he understand it, that
23 he's not supposed to give you overtime. If he thought he had
24 to give you overtime, for example, if you were an
25 administrative person like Ms. Smith on a time clock, overtime

SUMMATION - HACKER

66

1 there, you're not exempt under this act. But only -- motor
2 carrier, only certain criteria, certain categories, which the
3 judge will explain in more detail.

4 So we tried in the testimony to highlight some of
5 these things. You may not have understood at the time why are
6 we asking about certain questions, what they do with the
7 truck, do they go on the truck, do they load the truck, do
8 they step outside the truck and help it turn around. You
9 might have said, who cares, what's that have to do with it?

10 Those are criteria the judge will explain to you
11 that have to do with the Motor Carrier Act and that certain
12 things -- for example, one category that's not at case here --
13 I think Mr. Lichten already mentioned -- is a driver. A
14 driver is a clear category. If you're a driver interstate,
15 you don't get overtime. That's it. So if you get \$20 an hour
16 you get \$20 an hour, but you don't get overtime. Sixty hours
17 a week, it doesn't matter. Now, you can't work more than a
18 certain number of hours for other reasons, because there are
19 regulations, but....

20 So, again, you listen to the judge. That's all I
21 can ask, because this is a simple one.

22 As far as computation, if you find that we are
23 liable for overtime, it's just a matter of counting up hours,
24 as Mr. Lichten said. I suggest to you that the company is not
25 responsible for overtime. And there's that additional factor

SUMMATION - HACKER

67

1 that he mentioned to you, which was whether or not this was
2 intentional. And that's because if it's intentional, there
3 are extra damages, okay. And was this something that was
4 intentional? He says, disregard that Mr. Verderber says it's
5 done in the industry. But if it's done in the industry and
6 he's been doing it and his father's been doing it and
7 everyone's been doing it for all these years, if there were a
8 mistake, it would certainly not be intentional. But, again,
9 we think there is no mistake. We think he acted properly.

10 And each one of these has to be evaluated
11 separately, because each one's claim is separate. I'm lumping
12 them together, but they're really not together. Each man is
13 separate in his claim for hours, his claim for overtime, all
14 right.

15 And the judge will explain to you there are
16 different categories. The general theme they have in common
17 is that they're safety-related, and we believe that it was
18 explained to you that when you load a truck, if you don't load
19 it properly it can cause problems for the truck, for the
20 driver, an accident, a tip-over, this kind of a thing.

21 Now, the difference in the testimony, you have to
22 decide who to believe. First of all, I like the idea, I think
23 it was Mr. Griffin that said, when we go to the house, we have
24 nothing to do with the children or the -- they all leave. Did
25 he say that? He said, they all leave. And then the question

SUMMATION - HACKER

68

1 is, if they all leave, who's giving instructions in the house?
2 They just leave the house. How do you know what they want
3 packed? How do you know what they'll pack themselves? They
4 don't leave the house. If any of you have moved, you don't
5 just walk out of the house when the movers come and say, we'll
6 see you in a few hours.

7 And he also says, well, we're only there a few
8 minutes, Mr. Lichten, only a few minutes. What's going to
9 happen to a child? Nothing. Maybe. But maybe your child is
10 playing in a bedroom and you want to tell the mover about the
11 toys, what to pack. What if something happens? Could it be?

12 I'm sort of bouncing a couple -- I'm crossing over
13 different parts of this, but in the overtime period we have
14 the safety issue. When they load, there are people in the
15 house. There are people in the house. Children are in the
16 house. And when you load, you have to load carefully.

17 And is the driver always there watching you? Do you
18 picture the driver standing there for three hours doing
19 nothing but that? Why, for example, if that's true, why is
20 Mr. Callace paid \$15 an hour? He's stronger. Does that mean
21 he's stronger than Mr. Godwin physically, muscles? No. It
22 means that his experience is stronger. Mr. Godwin is new at
23 that. Mr. Callace was experienced.

24 What does that mean? Who cares if he's experienced
25 if he doesn't do anything different? Oh, I'm experienced, I'm

SUMMATION - HACKER

69

1 going to put this over here and I don't know where to put it.
2 You tell me everything. What's your experience worth? Why
3 was he invited so often on commercial jobs where you have to
4 have more experience? Because they want to make sure that
5 things are not broken, that trucks are properly loaded.
6 Safety-related considerations.

7 By the way, Mr. Verderber talked not only as a CEO
8 of the company which he's been, but, remember, he was a driver
9 too. He didn't just come in here and take over a company. He
10 drove for many years, drove a truck, learned how to load a
11 truck. He knows this business. And what he was saying is
12 things that a driver expects from their helpers. If I have to
13 go and turn my truck around, if my truck is disabled, I expect
14 those helpers to do something. That's the testimony you
15 heard.

16 In fact, Mr. Verderber said that some of these
17 people are so experienced, helpers, not drivers, that they
18 don't -- drivers don't even worry about it. They just let
19 them work completely. Others get some supervision. But if
20 there's any -- if the driver checks at the end just to see how
21 everything looks, does that mean that they're not exempt? You
22 decide that. You're going to decide the facts. You have to
23 decide, based on the law that the judge tells you.

24 Well, those are the claims that all three have in
25 common. Now we go to two claims that are unique to two of the

SUMMATION - HACKER

70

1 plaintiffs. The first one is the claim of discrimination, and
2 this is a very, very sensitive claim to Mr. Verderber. You
3 can see he insisted in his deposition, in his testimony that
4 he doesn't discriminate. He doesn't discriminate in
5 assignments. He certainly doesn't seem to discriminate in
6 hiring. He hired these people. He's given Mr. Griffin a
7 raise. Where was the discrimination?

8 Now, you heard two different -- so different that,
9 you know, you have to decide. Does Mr. Verderber walk around,
10 even occasionally, not every minute but even occasionally
11 shouting out racial epithets to the black, Afro-American,
12 Afro-Caribbean, Haitian as he mentioned? Does he go around
13 with nasty words, the N word, just freely? Some woman is
14 standing in a parking lot, says, I'm here to pick up my
15 boyfriend, and he shoots out an N word at her.

16 This is the same guy who invites them to his house,
17 who hires these guys, who gives them raises, who gives them a
18 second chance, it's the same guy who's cursing at them. Well,
19 Mr. Verderber denied it. You know, we can't call in ten
20 people to all say, I don't believe it or it never happens.

21 We have Ms. Smith on other things who said she's
22 there 22 years. Now, she's white, but she has a multiracial
23 child. She is sensitive. And if Mr. Verderber were the type
24 of person who was constantly saying things like that, what
25 would her reaction be? Would she be there 22 years and still

SUMMATION - HACKER

71

1 there and coming to testify? You have to decide.

2 And there is no middle ground on this one. Either
3 he said these things or he didn't say these things. I tell
4 you he didn't say them. You have to decide. If the man
5 you're looking at back there talks like that on a regular
6 basis to his employees who are majority of those groups,
7 Hispanic, Afro-American, it would be insane, let's face it.
8 It would be insane to do that. But that's not why. It's that
9 it's not him.

10 Does he get angry? Yes. He's told you that. Don't
11 bother me between 6 and 8 in the morning. I'm busy. So if
12 somebody comes up with some question, he might get angry.
13 These guys are movers. You know, have you ever heard somebody
14 has a mouth like a truck driver? These are truck drivers.
15 These are guys who move. These are tough people who live a
16 tough life. And do they sometimes, I'm sure in the area,
17 curse at one another and joke around in that way?

18 But that's different from what you heard. You heard
19 malicious, angry curses directed at people because of their
20 race. And I tell you that's not Keith Verderber and you heard
21 it. So it's for you to decide. But consider the evidence.
22 It's very self-serving evidence. Here are people looking for
23 a payday who come in and say what needs to be said to get the
24 payday. You may believe them, but think about the
25 circumstances. Think about the context. You've worked. Did

SUMMATION - HACKER

72

1 you ever hear people talk like that? If they did, what was
2 the reaction?

3 Mr. Griffin had the most detailed discussion. He
4 told a few stories about discrimination. But I don't really
5 think if you think about them that they hold water. What did
6 he say? He got a raise in less than two years, which isn't
7 bad, especially, you know, times have been tough. This was
8 not in the heyday. This was 2010. You know, we were just
9 coming back from a pretty tough time. And he got a raise. He
10 had a steady job.

11 So what was the discrimination? Forget the word.
12 Let's for now assume he said that stupid ugly word four times,
13 three times, five times, whatever it is. How did he
14 discriminate against him? He sent him out on the jobs. Did
15 he say, you know what, you're an N word, I'm not going to pay
16 you \$14 an hour, I'm going to pay you 10 today, still more
17 than minimum wage, take it or leave it? He didn't do that.
18 He sent him on the same jobs with the same people. He had him
19 drive one of the little trucks that he could drive because he
20 didn't have a license for the big trucks yet. He gave him
21 every opportunity.

22 And yet Mr. Griffin says, he discriminated against
23 me. What did he do? What did he do? He didn't tell us what
24 he did, did he? Did he tell us how he discriminated against
25 him? I didn't hear it. You know, he tells a story about some

SUMMATION - HACKER

73

1 telephone calls, somebody on the phone talking about some
2 piece of jewelry. And he says, and the person on the phone
3 said it wasn't Tra and it wasn't Mike. It wasn't Godwin and
4 Griffin. What was the point of that? Did Mr. Verderber
5 accuse him of any of that? No. So, you know, it's not clear.
6 What was the discrimination? They're now looking for money.
7 What was it? I don't know.

8 He went on jobs like anyone else. He had overtime.
9 He's even claiming, I didn't get paid for my overtime. So he
10 had overtime. He was working hours. And, in fact, when there
11 wasn't enough work there were times that he went to Mr.
12 Verderber's house, which was work. Quote, it's work. He
13 said, I didn't get paid for it or he said something like I
14 don't remember seeing it on my paycheck. Do you remember
15 that? What does that mean? Is it supposed to say Verderber
16 house and you get a different pay scale? No. It was just in
17 his paycheck, in his payroll.

18 If he could have -- we had all these pages. He
19 could have pointed to those pages and said, look, here was a
20 week that I worked and I didn't get paid because I was working
21 at his house. He didn't do that. Both he and Mr. Godwin
22 said, well, I have the, you know, slips of paper or something.
23 We didn't see any of that. All right? Nothing. None of that
24 was shown to you.

25 Oh, and also, because of this terrible

SUMMATION - HACKER

74

1 discrimination, Mr. Griffin told you that he has suffered
2 emotional distress, I think, is that right? And I asked him
3 about hospital bills or treatment records, and there is
4 nothing. So if he went to the hospital for terrible
5 treatment, I don't know. There's no record of that.

6 I would say one has to question if he's so
7 distressed by being called the N word but he's not distressed
8 about raping or sexually abusing a child. In the scale of
9 evil, there's a big difference there, even if it's true that
10 that word was used, which, again, it wasn't.

11 Oh, by the way, you know, Mr. Griffin made a big
12 point about second day, first day. I would invite you to take
13 a look at the book, Exhibit A, and look and see where he
14 worked first days and second days on jobs. See where there
15 was a second day and he didn't work. See if there were other
16 people that didn't work.

17 Because a lot of times what happens is that Mr.
18 Verderber testified you don't need as many people on the other
19 day. You have to cut back. Maybe the first day you have
20 more, the second day you have fewer. Some jobs, if you look,
21 you'll see on the first day there were fewer and the second
22 day there were more.

23 He talks about tips and he comes up with some number
24 and he talks about tips. What was that all about? You know,
25 does Mr. Verderber know about the tips? Was it ever raised

SUMMATION - HACKER

75

1 with him? He doesn't have anything to do with it. And who
2 would get the tip? If you worked on a job that was a two-day
3 job and you knew that the driver on the second day collected a
4 tip for the whole job, who would you go to talk to about your
5 share of the tip? I suggest you talk to the driver. You'd
6 say, hey, Tom, I worked the first day, what happened to my
7 part of the tip, what, did you take it? Right? I mean, it's
8 just common sense. It's the kind of thing adults do. If I
9 think I'm entitled to my tip for my first part of the job and
10 someone else collected it, I wouldn't be shy. Would you?
11 Think about that.

12 But he blames Mr. Verderber, because you know what,
13 it didn't happen. It doesn't happen. Mr. Verderber testified
14 it just isn't true, that, first of all, commercial jobs are
15 the least likely to give you a tip, because the guy who's
16 supervising the move is not going to usually give a tip. And
17 a lot of these he explained were accounts, like a general
18 account, like that NYU or something. You move for them all
19 the time so you don't get tips most of the time, at least
20 that's what he was told.

21 So this tip thing is, again, it's one of these phony
22 things to say, look, I was discriminated against because I
23 didn't get tips. Oh, but I did get tips on residential jobs,
24 but then there was something about they sent them to bad
25 neighborhoods or something or poor neighborhoods. And I

SUMMATION - HACKER

76

1 question you, because I think a lot of people know from their
2 own lives that people who are very rich are not very generous,
3 and people who often are poor are the most generous people
4 when it comes to a worker that does something for you.

5 But, again, you use your expertise. There's no
6 evidence here. There's no one else that they called. They
7 never called anybody but the three of them. All these people
8 they worked with, did any of those people come in and say,
9 yes, this happened to me, too, whether they were
10 African-American, Hispanic, whatever? Did anyone else come in
11 and say, I'm not on the case, but yes, this happened to me,
12 too? No.

13 And one last thing. I think it's important. Mr.
14 Verderber explained that there was another employee that he
15 hired a couple of years ago, also a formerly convicted felon,
16 not for any sexual thing and it was many years earlier. And
17 he hired that man, paid him \$12 an hour, and then he promoted
18 him and he promoted him again, and he's now the man, as Mr.
19 Verderber testified -- Mr. Verderber has been sitting here
20 each day, right? Who's running the company? He told you
21 who's running the company. This guy, this African-American
22 guy who's a convict, a convicted felon, he's now his warehouse
23 manager, \$20 an hour, trusted, and doing a great job.

24 Now, he hasn't been here to testify because he's
25 working. But do you think that this guy also would be working

SUMMATION - HACKER

77

1 there and taking this crap from Mr. Verderber if this is the
2 way Mr. Verderber talked to him, cursed him out and called him
3 the N word? Now, you notice one person on the table that
4 might have said he called me but didn't was Mr. Godwin. I
5 asked him if he was ever cursed at in his eight months. Well,
6 those must have been N word-free months, because he wasn't
7 cursed at. Never. In fact, when he was terminated -- and he
8 was terminated -- you remember what he said? He said, he told
9 me he couldn't use me in people's houses anymore because of
10 my, you know, my record. That's what he said. He didn't say,
11 he cursed me.

12 So let's talk a little bit about that now. So to
13 me, this is a very important charge, because this is the one
14 where they say, well, you know, there's a law and Mr.
15 Verderber didn't follow the law because he fired these two men
16 because they had a criminal record.

17 Now, we already know that he hires people with
18 criminal records and he keeps them on with criminal records.
19 That's not a problem for him. In fact, one of the things that
20 Mr. Lichten pointed to, he said, you know, Mr. Verderber never
21 made it clear that when he was doing this he checked the New
22 York State policy on -- something on hiring people with
23 criminal records. Remember that? And he said, he looked at
24 me like he had no idea what language I was talking. Remember
25 that? Just a few minutes ago.

SUMMATION - HACKER

78

1 Well, the reality is he probably didn't understand
2 what the heck he was talking about, because he does this all
3 the time. He embodies it. He hires these people. You know,
4 it's very easy for me to pay lip service. Oh, yes, I hire
5 former convicts. Oh, sure, sure. Do I have any in my office?
6 No, no, sorry, nobody now. He has them. He hires them. He
7 embodies it.

8 Does he answer the lawyer in here and say, yes, I
9 embody or I understand the policy of the state of New York?
10 No. He's a plain, simple guy. But he acts on it. So you
11 tell me if he takes that into account. Did he understand when
12 he was letting these people go if he let Mr. -- we'll get to
13 Mr. Griffin in a second. If he lets them go, did he
14 understand that this was a difficult choice for him?

15 One of the things I thought was interesting, I'm
16 sure you may have picked up on it too, with each one of them,
17 when he fired Mr. Godwin and even when he talked to Mr.
18 Griffin, whether he fired him or not, how was it done? Do you
19 remember the testimony? He called me into his office. In
20 fact, Mr. Godwin said, he called me at home and said, come
21 into my office, I need to talk to you. Do you remember that?

22 Think about that. That's pretty nice for a boss
23 nowadays. A lot of times they'll have somebody else just call
24 the guy up, tell him not to show up anymore, he's out of here.
25 Why confront the man? Because he felt he owed him an

SUMMATION - HACKER

79

1 explanation, and it was a calm, reasoned explanation.

2 But it wasn't -- he didn't sit there and go through
3 a checklist in the law, okay. He didn't -- let me say this:
4 He didn't know the law word for word the way Mr. Lichten does
5 and the way I do. What he did know was intuitively the
6 factors, which you will be told in detail by the judge and Mr.
7 Lichten already explained some of them.

8 In other words, what did he look at? What had
9 happened? Was it a serious crime? He thought it was. Were
10 these people a long time ago, they got out of jail years ago,
11 they've had a whole life since then? No. They got out -- Mr.
12 Griffin I think was out of jail less than a year and now he
13 gets a job. Do we know that he's rehabilitated?

14 One of the things that Mr. Lichten said is Mr.
15 Verderber didn't ask them if they were rehabilitated, right?
16 Well, I ask you a question and I think that the law actually
17 says you, if you're the person that's being questioned about
18 this, it's your obligation to tell the employer that you have
19 been rehabilitated and to provide him with proof of your
20 rehabilitation. That's one of the factors.

21 Nothing done here. You heard stories, but we don't
22 have anything that says either one of these men have been
23 rehabilitated. So we have seriousness, we have proximity,
24 time before you hired them in between.

25 You have other factors. How old was he? There's a

SUMMATION - HACKER

80

1 difference if he was an 18-year-old having consensual
2 relations with a 16-year-old. I'm not going to say it's
3 right, it's not, but it's a bit different if you're now 40
4 years old and you say, well, when I was 18 I did some things.
5 Maybe I even robbed a store. I went to jail for a couple
6 years and I've been clean for the last 15 years.

7 No, that's not what happened here. Right? This
8 was -- they were 30-, 31-year-old men with children. So
9 that's another factor. The judge will tell you all the
10 factors. You listen to those and you tell me and you tell the
11 judge in your verdict sheet whether or not Mr. Verderber
12 violated the law. That's your job. You're going to hear the
13 law from the judge and you're going to apply it to the facts,
14 and you're going to be the ones to decide did he violate the
15 law or not.

16 Now, Mr. Griffin's a little different. And, again,
17 our position is technically, he didn't really fire him,
18 because what he did say was, because he liked him so much and
19 he was so shocked -- and by the way, he was so shocked and yet
20 Mr. Griffin says, he knew all along I was a sex offender, he
21 knew all along the details. If he knew all along the details,
22 how come he was so shocked? How come he let you be in a room
23 with his wife all the time? How come -- does it make sense?

24 So now, you have Mr. Griffin here and, you know, you
25 say, look -- and, again, this is the Allied thing, okay.

SUMMATION - HACKER

81

1 Allied is the company for which they're an agent. Allied has
2 a policy. This wasn't something Mr. Verderber wanted, not at
3 all, but it was something he had to live with. And the policy
4 was that if you failed the background check -- and they did
5 fail the background check, based on their criminal record, not
6 everybody fails, every criminal record is not a failure, but
7 they failed -- that he cannot use you. He cannot use you.

8 It's not really an option. If he does, he's going
9 to be fined, he'll probably lose his license to be your agent.
10 So he cannot use you on their jobs. Well, that's most of the
11 work.

12 So, again, Mr. Verderber says, I told them I might
13 be able to use them very limited. It's not really a living,
14 you're not going to make a living out of it; and that Mr.
15 Griffin said, talk to my lawyer. Mr. Griffin says he got
16 cursed out. So, again, it's for you to decide; but in either
17 event, I think if you think he was fired, I think you would
18 say if he had been fired it would have been for an appropriate
19 reason and that it's not a violation of New York State law.

20 So, again, I thank you. Oh, and by the way, they
21 could have under the law asked for a written statement
22 explaining why they were fired and they never did, neither one
23 of them. You can ask for a written statement so that then you
24 can say, well, he didn't explain this and this and this and
25 this. But, you know, when somebody talks to you person to

REBUTTAL SUMMATION - LICHTEN

82

1 person like that, they're not going to go down a checklist and
2 say, oh, by the way, the this and the this and the this and
3 the this. He said, I can't use you because of your criminal
4 record, that's it. You know, but he told you the factors. He
5 did tell you them. So, again, you can look at the testimony,
6 you can come back to the judge if you need more testimony.
7 You have the exhibit. I thank you for your time. I'm sorry
8 I'm taking so much of your time, but I do appreciate it and
9 it's very important to my client, as you know. So thank you.

10 THE COURT: Thank you, Counsel. Mr. Lichten.

11 MR. LICHTEN: I just have a few points in response
12 to Mr. Hacker's summation. I know it's been a long day, I'll
13 just keep it real brief.

14 Mr. Hacker said that does this book -- is this book
15 evidence that Mr. Verderber intentionally tried to cheat
16 people? Maybe not. Maybe it's evidence of a very sloppy
17 bookkeeping system. But it's a sloppy bookkeeping system that
18 always seemed to result in less hours being credited to the
19 person. So maybe he intentionally has a sloppy bookkeeping
20 system.

21 He's not setting out to say, well, I'm going to pay
22 everyone five hours less each week. What happens is they get
23 paid five hours less each week because there's no effort being
24 put into making sure this is accurate; and that effort is
25 intentional, and that creates a pattern, and that creates

REBUTTAL SUMMATION - LICHTEN

83

1 hours that people aren't paid for, and that creates a need to
2 compensate those people.

3 Mr. Hacker repeatedly said that Mr. Verderber must
4 have had a good feeling towards Mr. Griffin because he invited
5 him to his house. He invited him to his house to do work at
6 his house. He invited him to do work on his personal house
7 and personal items, and then he says he paid him for that
8 work. That's not evidence that you like someone. That's
9 evidence that you like their work.

10 And Mr. Verderber did like Mr. Griffin's work. Mr.
11 Griffin worked there for two and a half years. He got a
12 raise. There's no evidence that his work was bad. So why did
13 he have to be fired in the end? Why couldn't he continue to
14 do that job? He did it for two and a half years and there was
15 no problem. Mr. Verderber did have him to his house to do
16 work. And so then that just adds to the question, why was he
17 deemed to be unqualified for this job after two and a half
18 years?

19 Mr. Hacker says that Mr. Callace has more experience
20 and that's why he was paid \$15 an hour, and that the
21 experience must be -- have to do with safety on the trucks.
22 Well, the experience might be that he knew how to pack things
23 with paper and so that glasses wouldn't get broken, so that
24 furniture wouldn't be harmed, not necessarily safety of the
25 trucks but safety of the items that are being moved on the

REBUTTAL SUMMATION - LICHTEN

84

1 trucks. And that has nothing to do with the exemption or the
2 Motor Carrier Act.

3 Mr. Callace testified he worked primarily in the
4 warehouse. He must have had experience in knowing how things
5 should be packed in the warehouse, how things should be
6 stored, how things should be taken off the truck so that
7 they're not broken or they're not spoiled or they're not
8 shattered, like glass.

9 Mr. Hacker threw in and said, well, Mr. Griffin
10 wasn't stressed by raping a child. Mr. Griffin said he thinks
11 about that every day and he's sorry about it and he wishes he
12 could take it back. He didn't say he wasn't stressed by it.
13 There's no evidence that he wasn't stressed by it, that he
14 wasn't affected by it.

15 What -- Mr. Hacker asked, what is the discrimination
16 here? What were the discriminatory acts? Well, as Mr.
17 Griffin laid out, that these jobs take two or three days, the
18 tips are normally given on the last day and the people who
19 aren't there for the last day don't get the tips. That's the
20 industry practice, that's what the drivers did, and by not
21 assigning him to the last day of these jobs he didn't get paid
22 the tips for those days. I mean, it's not an enormous amount
23 of money that he resulted in losing because of the
24 discrimination, but it was money nonetheless and it was
25 discrimination nonetheless.

REBUTTAL SUMMATION - LICHTEN

85

1 Mr. Hacker says that he was a pretty nice boss
2 because he personally told Mr. Griffin to get the fuck out of
3 here. I don't think that's evidence of a pretty nice boss. I
4 think that's evidence of someone that's angry and that he was
5 shocked by getting this background check back.

6 And that Mr. Hacker says, well, he doesn't know the
7 law as well as I do. He doesn't have to know the law as well
8 as I do, but if he's an employer he has to know the employment
9 laws. He has to know who is entitled to overtime, because
10 that's his job to know that if he's the CEO and the president
11 of a business with 50 employees.

12 He says he doesn't go through a checklist before he
13 fires someone because of their criminal record, but that's
14 exactly what he's supposed to do. He's supposed to go through
15 this checklist.

16 Mr. Hacker makes fun of the first item on the
17 checklist, which is the public policy of this state, as
18 expressed in the law, to encourage the employment of persons
19 previously convicted of one or more criminal offenses. That
20 is the law. I mean, I didn't make it up. I mean, you can
21 make fun of me, but you can't make fun of the law. Mr.
22 Verderber was supposed to take that public policy into account
23 before he fired someone.

24 And firing someone is a big deal, especially someone
25 who's worked for you for two and a half years. Mr. Hacker

REBUTTAL SUMMATION - LICHTEN

86

1 says, well, if he didn't fire him then he might lose his
2 license. When he talks about license, he's not talking about
3 a public license that you get from the state. He's talking
4 about business from Allied.

5 And if he loses business from Allied, the judge will
6 instruct you as to what the relevance of that is. Nothing.
7 If the law is the law, he has to follow it and he can't just
8 blame it all on Allied or whatever policy he thinks they have
9 with regard to this law that is supposed to encourage
10 employers to keep people on the job who have criminal records.

11 In the end, Mr. Hacker said that they had a right to
12 ask for in writing why they were fired. They knew why they
13 were fired. It's obvious why they were fired. They were
14 fired because their criminal background check came back two
15 days before they were fired and showed they had a criminal
16 record. Again, in this country if you have a criminal record,
17 you're entitled after you pay your debt and after you serve
18 your time to be able to work and to contribute and to be a
19 productive member of society, and that's all these men want.
20 Thank you.

21 THE COURT: Thank you, Counsel. I'm going to take a
22 brief five-minute break and I'll instruct you on the law.
23 It's going to take me about 20 minutes to do so. So you can
24 go back if you'd like, I am, but it's a brief five-minute
25 break.

JURY CHARGE

87

1 (Jury exits courtroom.)

2 (Recess.)

3 (Jury enters courtroom.)

4 THE COURT: Ladies and gentlemen of the jury, now
5 that you have heard the evidence in the case as well as the
6 arguments of each side, it is my duty to instruct you as to
7 the law applicable in this case. We are all grateful to you
8 for the close attention that you've been giving this case. I
9 ask that you continue to do so as I give you these
10 instructions.

11 As you know, the plaintiffs, Trathony Griffin,
12 Michael Godwin and Frank Callace, claim that defendant failed
13 to pay them minimum wage for each hour worked, failed to pay
14 them overtime wages, and failed to pay them their agreed-upon
15 hourly rate for all hours worked. Plaintiffs Griffin and
16 Godwin also claim that defendant discriminated against them on
17 the basis of their race, by giving them less lucrative
18 assignments than those given to Caucasian employees, and that
19 defendant unlawfully terminated their employment because of a
20 prior conviction for a criminal offense. Defendant Astro
21 Moving and Storage Company denies these claims.

22 My instructions will be in three parts:

23 First, I will instruct you regarding the general
24 rules that define and govern the duties of a jury in a civil
25 case such as this; second, I will instruct you as to the legal

JURY CHARGE

88

1 elements of plaintiffs' claims; and third, I will give you
2 some general rules regarding your deliberations.

3 Let me start by restating our respective roles as
4 jury and judge. Your duty, as I mentioned in my opening
5 instructions, is to find the facts from all the evidence in
6 this case. You are the sole judges of the facts and it is for
7 you and you alone to determine what weight to give the
8 evidence, to resolve such conflicts that may have appeared in
9 the evidence, and to draw such inferences as you deem to be
10 reasonable and warranted from the evidence.

11 My job is to instruct you on the law. You must
12 apply the law in accordance with my instructions to the facts
13 as you find them. I remind you of your sworn obligation to
14 follow the law as I describe it to you, whether you agree with
15 it or not. You should not be concerned about the wisdom of
16 any rule of law that I state. Regardless of any opinion you
17 may have about what the law may be or should be, it would be a
18 violation of your oaths as jurors to base your verdict upon
19 any other view of the law than given to you in these
20 instructions.

21 If any of the lawyers have stated a legal principle
22 which differs from any that I state to you in my instructions,
23 you must be guided solely by what I instruct you about the
24 law. You should not single out any one instruction as alone
25 stating the law, but should consider my instructions as a

JURY CHARGE

89

1 whole. Since it is your job and not mine to find the facts, I
2 have neither expressed nor attempted to intimate an opinion
3 about how you should decide the facts of this case. Nothing I
4 have said or done in the course of the trial should be taken
5 by you as expressing an opinion about the facts. On occasion,
6 I may have asked a question of a witness. You should attach
7 no special significance to these questions because they were
8 asked by me.

9 You must determine the facts in this case based
10 solely on the evidence or those inferences which can
11 reasonably be drawn from the evidence. Evidence has been
12 presented to you in the form of sworn testimony from the
13 witnesses, both on direct and cross-examination, and exhibits
14 that have been received in evidence.

15 Certain things are not evidence and are to be
16 entirely disregarded by you in deciding what the facts are:
17 Arguments, statements or summations by the lawyers, objections
18 to the questions or the offered exhibits, and any testimony
19 that has been excluded, stricken, or that you have been
20 instructed to disregard.

21 As I mentioned in my opening instructions, generally
22 speaking, there are two types of evidence: Direct and
23 circumstantial.

24 Direct evidence is testimony from a witness about
25 something he or she knows by virtue of his or her own senses

JURY CHARGE

90

1 -- something he or she has seen, felt, touched or heard.

2 The other type of evidence is indirect or
3 circumstantial evidence. Circumstantial evidence is proof of
4 a chain of circumstances that point to the existence or
5 nonexistence of certain facts. A simple example of
6 circumstantial evidence would be as follows: Suppose you came
7 to court on a day when the weather was clear, sunny and dry.
8 It was dry, a little sunny this morning. However, after
9 several hours in the courtroom where there are no windows, you
10 observe a person come in wearing a wet raincoat and another
11 person shaking a wet umbrella. Without ever looking outside,
12 you would not have direct evidence that it rained, but you
13 might infer from these circumstances that while you were
14 sitting in court it rained outdoors. That is all there is to
15 circumstantial evidence. Based on facts that you find have
16 been proven, you draw such reasonable inferences or
17 conclusions as seem justified in light of your experience and
18 common sense.

19 There is no distinction between direct and
20 circumstantial evidence. You may use both types of evidence
21 in reaching your verdict in this case. You must base your
22 verdict on a reasonable assessment of all of the evidence.

23 You are permitted to draw, from the facts which you
24 find to be proven, such reasonable inferences as would be
25 justified in light of your experience. Inferences are

JURY CHARGE

91

1 deductions or conclusions that reason and common sense lead
2 you, the jury, to draw from the facts that have been
3 established by the evidence in the case. Use your common
4 sense in drawing inferences; however, you are not permitted to
5 engage in mere guesswork or speculation.

6 There are times when differing inferences may be
7 drawn from facts, whether proved by direct or circumstantial
8 evidence. The plaintiffs ask you to draw one set of
9 inferences. The defendant asks you to draw another set of
10 inferences. It is for you and you alone to decide what
11 inferences you will draw.

12 No significance should be attached to the fact that
13 a document or other exhibit was introduced by one party rather
14 than by the other. Any party is entitled to the benefit of
15 any evidence tending to establish its contentions, even though
16 such evidence may have come from witnesses or documents
17 introduced by another party.

18 In deciding the factual issues presented in this
19 case, the test is not which side brings the greater number of
20 witnesses or presents the greater quantity of evidence, but
21 which witnesses and evidence appeal to your minds as being
22 most accurate and trustworthy.

23 In deciding what facts are in the case, you must
24 consider all the evidence that has been offered. In doing
25 this, you must decide which testimony to believe and which

JURY CHARGE

92

1 testimony not to believe. You are the sole judges of
2 credibility -- or believability -- of the witnesses and the
3 weight their testimony deserves. You should carefully examine
4 all the evidence and the circumstances under which each
5 witness testified, and every matter in evidence that tends to
6 show whether a witness is worthy of your belief.

7 Your determination of the issue of credibility may
8 depend on how the witness impressed you. Was the witness
9 candid and forthright or did he or she seem to be hiding
10 something or being evasive or suspect in some way? How did
11 the witness's testimony on direct examination compare with the
12 witness's testimony on cross-examination? Was the witness
13 consistent in the testimony given or were there
14 contradictions? Did the witness appear to know what he or she
15 was talking about and did the witness strike you as someone
16 who was trying to report that knowledge accurately? How much
17 you choose to believe any witness may be influenced by any
18 interest the witness may have in the outcome of the case or by
19 any bias that you may perceive the witness to have.

20 Inconsistencies or discrepancies in the testimony of
21 a witness, or between the testimony of different witnesses,
22 may or may not cause you to discredit such testimony. In
23 weighing the effects of a discrepancy, you should consider
24 whether it pertains to a matter of importance or an
25 unimportant detail, and whether the discrepancy results from

JURY CHARGE

93

1 an innocent error or intentional falsehood.

2 If you find that any statement made by a witness on
3 the stand is false, in whole or in part, you may disregard the
4 particular part you find to be false, or you may disregard his
5 or her entire testimony as not worthy of belief.

6 In determining the issues of fact and rendering a
7 verdict in this case, you should perform your duty with
8 complete impartiality and without bias, sympathy or prejudice
9 as to any party. All parties are equal before the law and all
10 are entitled to the same fair consideration. All parties
11 expect that you will carefully and impartially consider all
12 the evidence, follow the law as it is now being given to you,
13 and reach a just verdict, regardless of the consequences.

14 As a general rule, in a civil case such as this, the
15 plaintiffs have the burden of proving each of the essential
16 elements of their claims by a preponderance of the evidence.
17 If the proof fails to establish any essential element of the
18 plaintiffs' claims by a preponderance of the evidence, you
19 should find for the defendant.

20 To establish a claim "by a preponderance of the
21 evidence" means to prove that something is more likely so than
22 not so. In other words, a preponderance of the evidence means
23 such evidence as, when considered and compared with the
24 evidence opposed to it, produces in your mind the belief that
25 what is sought to be proved is more likely true than not true.

JURY CHARGE

94

1 A preponderance of the evidence means the greater
2 weight of the evidence. That does not mean the greater number
3 of witnesses or the greater length of time taken by either
4 side. This determination is based on the quality and
5 persuasiveness of the evidence, the weight and the effect that
6 it has on your minds.

7 In determining whether a claim has been proved by a
8 preponderance of the evidence, you may consider the relevant
9 testimony of all witnesses, regardless of who may have called
10 them, and all the relevant exhibits received in evidence,
11 regardless of who may have produced them.

12 If you find that the credible evidence on a given
13 issue is in balance or evenly divided between the parties,
14 that it is equally probable that one side is right as it is
15 that the other side is right, or that the evidence produced by
16 the party having the burden of proof, which is plaintiffs in
17 this case, is outweighed by evidence against their claims,
18 then you must decide that issue against the party having the
19 burden of proof, or plaintiffs in this case. That is because
20 the party bearing the burden must prove more than simply
21 equality of evidence -- plaintiffs must prove the elements at
22 issue by a preponderance of the evidence. On the other hand,
23 plaintiffs need prove no more than a preponderance. So long
24 as you find that the scales tip, however slightly, in favor of
25 plaintiffs -- that what they claim is more likely true than

JURY CHARGE

95

1 not true -- then the element will have been proved by a
2 preponderance of the evidence.

3 Some of you may have heard of proof beyond a
4 reasonable doubt, which is the proper standard in a criminal
5 trial. That requirement does not apply to a civil case and
6 you should put it out of your mind.

7 You have heard evidence that at some earlier time a
8 witness has said or done something which counsel argues is
9 inconsistent with the witness's trial testimony.

10 Evidence of a prior inconsistent statement is not to
11 be considered by you as affirmative evidence in determining
12 liability. Evidence of a prior inconsistent statement was
13 placed before you for the more limited purpose of helping you
14 decide whether to believe the trial testimony of the witness
15 who contradicted himself or herself. If you find that the
16 witness made an earlier statement that conflicts with his or
17 her trial testimony, you may consider that fact in deciding
18 how much of his or her testimony, if any, to believe.

19 In making this determination, you may consider
20 whether the witness purposely made a false statement or
21 whether it was an innocent mistake; whether the inconsistency
22 concerns an important fact, or whether it had to do with a
23 small detail; whether the witness had an explanation for the
24 inconsistency, and whether that explanation appealed to your
25 common sense. It is exclusively your duty, based upon all the

JURY CHARGE

96

1 evidence and your own judgment, to determine whether the prior
2 statement was inconsistent, and if so how much, if any, weight
3 to give to the inconsistent statement in determining whether
4 to believe all or part of the witness's testimony.

5 Now I am turning to the specific claims in this
6 case. You must consider the evidence separately with respect
7 to each count and with respect to each plaintiff. You will be
8 asked to render a separate verdict in each count, and I will
9 provide you with a verdict sheet that will assist you in doing
10 so.

11 By way of review, plaintiffs make three types of
12 claims: First, all three plaintiffs claim that defendant
13 failed to pay them minimum wage, failed to pay them overtime,
14 and failed to pay them the agreed-upon wage; second,
15 Plaintiffs Griffin and Godwin claim employment discrimination
16 on the basis of race; and third, Plaintiffs Griffin and Godwin
17 claim that defendant wrongfully terminated their employment on
18 the basis of their prior criminal conviction.

19 The Fair Labor Standards Act, which I may sometimes
20 refer to as FLSA, and the New York Labor Law, both require
21 employers to pay minimum wages to their employees at a rate
22 that is set by law. Both laws also require employers to pay
23 overtime wages to their employees who work longer than 40
24 hours in a workweek. Under both the Fair Labor Standards Act
25 and the New York Labor Law, compensation for hours worked in

JURY CHARGE

97

1 excess of 40 hours is calculated at a rate not less than one
2 and one-half times either the minimum wage or the regular rate
3 at which the employee is paid, whichever is higher.

4 The provisions of both the Fair Labor Standards Act
5 and the New York Labor Law are identical in a number of
6 respects. I will only point out the differences between the
7 two laws when it is necessary to do so.

8 To make out a minimum wage claim under the Fair
9 Labor Standards Act, plaintiffs must prove each of the
10 following three elements by a preponderance of the evidence:
11 First, plaintiffs must prove that each was an employee of the
12 defendant during the relevant time period; second, plaintiffs
13 must prove that they were employees engaged in commerce or the
14 production of goods for commerce, or that they were employed
15 by an enterprise engaged in commerce or the production of
16 goods for commerce; third, plaintiffs must prove that the
17 defendant failed to pay the minimum wage as required by law.
18 The elements required to prove a violation of the minimum wage
19 provisions of the New York Labor Law are essentially the same.

20 In this case, the parties have stipulated that the
21 first two elements are met and you, therefore, do not need to
22 concern yourself with these elements. However, the parties
23 disagree on whether plaintiffs were properly paid the legally
24 required minimum wage during at least some portion of the time
25 they were employed by defendant.

JURY CHARGE

98

1 To prevail on this claim, plaintiffs must prove, by
2 a preponderance of the evidence, that the pay they received
3 for any one or more weeks was not the amount they should have
4 received, according to the law, for the hours they proved they
5 worked.

6 During the relevant time period, the minimum wage
7 was \$7.25 per hour. This means that for every hour up to and
8 including 40 hours in a given week that each plaintiff proves
9 by a preponderance of the evidence that he worked, plaintiffs
10 are entitled to receive at least \$7.25 per hour.

11 If you find that Plaintiff Griffin was not paid the
12 minimum wage of \$7.25 per hour for any part of the time he
13 proved by a preponderance of the evidence that he worked for
14 defendant between July 27, 2008 and February 14, 2011, then
15 you must find in favor of Plaintiff Griffin on his minimum
16 wage claim.

17 If you find that Plaintiff Godwin was not paid the
18 minimum wage of \$7.25 per hour for any part of the time that
19 he proved by a preponderance of the evidence that he worked
20 for defendant between May 23, 2010 and February 12, 2011, then
21 you must find in favor of the Plaintiff Godwin on his minimum
22 wage claim.

23 If you find that Plaintiff Callace was not paid the
24 minimum wage of 7.25 per hour for any part of the time that he
25 proved by a preponderance of the evidence that he worked for

JURY CHARGE

99

1 defendant between May 24, 2009 and September 14, 2010, then
2 you must find in favor of the Plaintiff Callace on his minimum
3 wage claim.

4 Turning to the overtime claim. In order to prove
5 that defendant failed to pay them overtime wages under the
6 Fair Labor Standards Act, plaintiff must prove, all three
7 plaintiffs must prove three elements by a preponderance of the
8 evidence: First, plaintiffs must prove that they were
9 employees of defendant during the relevant time period;
10 second, that plaintiffs were employees engaged in commerce or
11 the production of goods for commerce, or that they were
12 employed by an enterprise engaged in commerce or the
13 production of goods for commerce. As discussed earlier, the
14 parties have stipulated that these two elements are met and
15 you, therefore, do not need to concern yourself with them.
16 However, the parties disagree as to whether plaintiffs are
17 owed any overtime wages.

18 When employees work more than 40 hours in a week,
19 the law requires that they receive what is commonly known as
20 overtime pay. The amount of overtime that is due under the
21 law is one-and-one-half times the employee's regular wage or
22 one-and-one-half times the legal minimum wage, whichever is
23 greater. To prove that they were not paid overtime pay as
24 required by the law, the plaintiffs must establish by a
25 preponderance of the evidence that during part or all of the

JURY CHARGE

100

1 time period they worked for the defendant, the defendant did
2 not pay them the legally required additional amount for the
3 hours they worked in excess of 40 hours for any given week.
4 Again, the elements required to prove a violation of both
5 laws, the Fair Labor Standards Act and the New York Labor Law,
6 are essentially the same.

7 The defendant is responsible for maintaining
8 accurate records of plaintiffs' hours. Where the defendant's
9 records are inaccurate or inadequate, plaintiffs merely need
10 to show that they had, in fact, performed work for which they
11 are improperly compensated, and to show the amount of that
12 work as a matter of just and reasonable inference. The burden
13 then shifts to defendant to come forward with evidence of the
14 precise amount of work performed or with evidence to negate
15 the reasonableness of the inference to be drawn by plaintiffs'
16 evidence. If the defendant fails to produce such evidence,
17 you may then award damages to the plaintiffs even though the
18 results be only approximate. The plaintiffs may testify from
19 their present memory and recollection alone.

20 The employee's regular wage for a given week is
21 calculated by taking the employee's total weekly compensation,
22 divided by the number of hours for which that compensation was
23 intended. If you find that the plaintiffs' regular wage rate
24 was less than the minimum wage, then overtime should be
25 calculated based on the legal minimum wage that the plaintiffs

JURY CHARGE

101

1 were entitled to have received for the time period in question
2 and not on what the plaintiffs were actually paid. As an
3 example, if you were to find that plaintiffs received less
4 than the minimum wage between June 5, 2010 and June 11, 2010,
5 then for the hours they worked in excess of 40 hours in a
6 week, you would multiply the minimum wage in effect at that
7 time, which was \$7.25, by 1.5 to get plaintiff's proper
8 overtime rate. This means that you would get an overtime rate
9 of \$10.87 for the period from June 5, 2010 to June 11, 2010
10 were you to find that they were paid the minimum wage, or
11 less, as their regular rate.

12 If you find that the plaintiffs have proven all of
13 the facts necessary to establish their overtime claims, you
14 must then consider whether defendant has proven by a
15 preponderance of the evidence that plaintiffs' job duties
16 prevent them from obtaining overtime. Here, defendant has the
17 burden of proof. Defendant contends that because it is a
18 motor carrier, plaintiffs do not qualify for overtime pay
19 under the Fair Labor Standards Act because of the motor
20 carrier exemption.

21 Defendant claims that as "helpers" or "loaders,"
22 plaintiffs' duties included "loading" items into trucks, and
23 that these "loading" duties fall within the motor carrier
24 exemption. In order to prove that plaintiffs are not entitled
25 to overtime pay, defendant must prove by a preponderance of

JURY CHARGE

102

1 the evidence that plaintiffs had employment responsibilities
2 and tasks that affected motor vehicle operation safety and
3 that such tasks constituted a substantial part of their
4 ordinary employment activities, that is, that any such
5 responsibilities and tasks were not so "trivial, casual, or
6 occasional" to be de minimus.

7 Defendant must show that plaintiffs had
8 responsibility when a motor vehicle is being loaded to
9 exercise some degree of judgment and discretion in planning
10 and building a balanced load or in placing, distributing, or
11 securing the pieces of freight in such a manner that the safe
12 operation of the vehicles on the highways in interstate
13 commerce will not be jeopardized. Plaintiffs are not engaged
14 in safety operations if their duties did not include planning
15 and building a balanced load, or placing, distributing or
16 securing the pieces of freight, or any such tasks were so
17 trivial and insignificant as to be de minimus.

18 Defendant must show that as a driver's helper,
19 plaintiffs were required to ride in defendant's vehicles when
20 it is being operated across state lines or across
21 international borders. Examples of activities that would be
22 performed by a driver's helper include placing flags, flares
23 and fuses as required by the safety regulations, going for
24 assistance while the driver protects the vehicle on the
25 highway, or vice versa, assisting the driver with changing

JURY CHARGE

103

1 flat tires or making minor repairs, and assisting in putting
2 on or removing chains.

3 If you find that plaintiffs were engaged in
4 activities that affect the safety of operations, the defendant
5 is not liable for failure to pay overtime wages. However, if
6 you find that plaintiffs had no more than trivial
7 responsibilities and tasks that affected motor vehicle safety
8 of operation, then you may find defendant liable for failure
9 to pay plaintiffs overtime.

10 Plaintiffs also seek to recover unpaid regular wages
11 under the New York Labor Law. If you find that plaintiffs
12 have proven by a preponderance of the evidence that defendant
13 failed to pay him for the hours that they actually worked,
14 then you must find in favor of plaintiffs in an amount equal
15 to plaintiffs' standard hourly rate of pay multiplied by the
16 number of hours that plaintiffs worked but were not paid. If
17 you find that plaintiffs have failed to prove by a
18 preponderance of the evidence that they were not paid for all
19 the hours that they worked, then you must decide in favor of
20 defendant on plaintiffs' claim for unpaid regular wages.

21 Under the law, all workweeks stand alone. This
22 means that it is not necessary for you to determine the hours
23 worked by the plaintiffs -- I'm going to read that again.
24 This means that it is necessary for you to determine the hours
25 worked by the plaintiffs on a weekly basis in determining

JURY CHARGE

104

1 whether or not they were paid overtime compensation for the
2 hours worked in excess of 40 hours each workweek. The law
3 does not permit the averaging of hours worked during
4 workweeks. You cannot reduce the number of overtime hours you
5 find plaintiffs worked by hours not worked by plaintiffs in
6 other weeks. For example, if an employee worked 50 hours
7 during one week and 30 hours the next, that employee must be
8 found to have worked ten overtime hours. You cannot find the
9 employee worked less than 10 overtime hours because of a
10 workweek where the employee worked fewer than 40 hours.

11 If you find that defendant violated the Fair Labor
12 Standards Act, then you must determine whether that violation
13 was willful. To find defendant's violation was willful, you
14 must find that plaintiffs have proven by a preponderance of
15 the evidence that the defendant knew of its obligation to pay
16 minimum wages or overtime or both and failed to pay them, or
17 that defendants recklessly or voluntarily disregarded their
18 obligation to pay minimum wages or overtime wages or both, and
19 failed to pay them. In other words, a violation of the
20 applicable law is willful if it is knowing, deliberate, and
21 voluntary or in reckless disregard of these obligations.

22 If you find in favor of any of the plaintiffs on
23 their New York Labor Law claims, you must determine whether
24 defendant had a good faith basis to believe that its
25 underpayments were in compliance with the law. The defendant

JURY CHARGE

105

1 bears the burden of proof to show that its failure to comply
2 with the law, should you so find, was in good faith. To
3 establish good faith, the defendant must show that it had an
4 honest intention to ascertain and follow the dictates of the
5 law and that it had reasonable grounds for believing that its
6 conduct complied with the law.

7 Turning to Plaintiffs Griffin and Godwin's
8 discrimination claim based on race. In this case, Plaintiffs
9 Griffin and Godwin claim that defendant discriminated against
10 them on the basis of their race by assigning them less
11 lucrative jobs than similarly situated Caucasian employees.
12 Plaintiffs bring this claim under Section 1981 of Title 42 of
13 the United States Code and under New York Executive Law
14 Section 296, which is also known as the New York State Human
15 Rights Law. Title 42, United States Code, Section 1981
16 provides, in relevant part:

17 All persons within the jurisdiction of the United
18 States shall have the same right in every state and territory
19 to make and enforce contracts, to sue, be parties, give
20 evidence, and to the full and equal benefit of all laws and
21 proceedings for the security of persons and property as is
22 enjoyed by white citizens, and shall be subject to like
23 punishment, pains, penalties, taxes, license, and exactions of
24 every kind, and to no other.

25 The provisions of both Section 1981 and the New York

JURY CHARGE

106

1 State Human Rights Law are identical in most respects, and
2 I'll only point out the differences where necessary.

3 To establish a claim under Section 1981, plaintiffs
4 must prove, by a preponderance of the evidence, the following
5 three elements: First, that the plaintiffs are members of a
6 class protected by Section 1981; second, that the defendant
7 intentionally discriminated against plaintiffs on the basis of
8 race; and third, that the discrimination interfered with a
9 protected activity as defined in Section 1981.

10 I instruct you that Plaintiffs Griffin and Godwin
11 are members of the African-American group, which is protected
12 by Section 1981. Therefore, plaintiffs have established the
13 first element.

14 To prove this claim, Plaintiffs Griffin and Godwin
15 must prove, by a preponderance of the evidence, that in taking
16 the action complained of, the defendant was motivated, at
17 least in part, by a racially discriminatory purpose, that is,
18 Plaintiffs Griffin and Godwin must prove that the defendant
19 intentionally and purposefully discriminated against them
20 because of their race.

21 In determining whether the defendant intentionally
22 discriminated against plaintiffs in assigning jobs on the
23 basis of their race, you may consider all the evidence
24 presented in the case. However, keep in mind that it is not
25 enough for the plaintiffs to show that the defendant's actions

JURY CHARGE

107

1 had a discriminatory effect; the plaintiffs must show that, in
2 taking these actions, the defendant had, at least in part, a
3 discriminatory purpose or intent.

4 If Griffin or Godwin proves that defendant acted
5 with discriminatory intent, then plaintiffs must also prove,
6 in order to prevail, that such action interfered with a right
7 protected by Section 1981, such as the right to contract. The
8 parties agree that plaintiffs' allegations that they were
9 discriminated against in the assignment of job falls under the
10 right to contract and, as such, is protected by Section 1981.

11 Turning to the final claim, Plaintiffs Griffin and
12 Godwin claim that their employment was unlawfully terminated
13 because they each have been convicted of a criminal offense.
14 They bring this claim under New York Executive Law Section
15 296(15), which is also known as the New York Human Rights Law.
16 This statute provides, in relevant part:

17 It shall be an unlawful discriminatory practice for
18 any person, agency, bureau, corporation or association,
19 including the state and any political subdivision thereof, to
20 deny any license or employment to any individual by reason of
21 his or her having been convicted of one or more criminal
22 offenses, or by reason of a finding of a lack of "good moral
23 character" which is based upon his or her having been
24 convicted of one or more criminal offenses, when such denial
25 is in violation of the provisions of the correction law.

JURY CHARGE

108

1 The defendant may terminate an employee based upon
2 their criminal conviction if defendant shows that there is a
3 direct relationship between one or more of the previous
4 criminal offenses and the specific employment sought or held
5 by the individual or the granting or continuation of the
6 employment would involve an unreasonable risk to property or
7 to the safety or welfare of specific individuals or the
8 general public. "Direct relationship" means that the nature
9 of the criminal conduct for which the plaintiffs were
10 convicted have a direct bearing on each plaintiff's fitness or
11 ability to perform one or more of the duties or
12 responsibilities of a helper.

13 In determining if there is a direct relationship or
14 an unreasonable risk, you may consider, one, New York State
15 public policy to encourage the licensure and employment of
16 persons previously convicted of one or more criminal offenses;
17 two, plaintiffs' specific duties and responsibilities; three,
18 the bearing, if any, the criminal offense for which each
19 plaintiff was previously convicted will have on his fitness or
20 ability to perform one or more such duties or
21 responsibilities; four, the length of time since the
22 occurrence of the criminal offense or offenses; five, the age
23 of the plaintiff at the time of the occurrence of the criminal
24 offense or offenses; six, the seriousness of the offense or
25 offenses; seven, any information produced by the plaintiffs or

JURY CHARGE

109

1 produced on their behalf, in regard to their rehabilitation
2 and good conduct; and eight, the legitimate interest of
3 defendant in protecting property and the safety and welfare of
4 specific individuals or the general public.

5 If you find that there was a direct relationship
6 between the plaintiffs' prior convictions and their specific
7 job duties, then you must find for defendant. If, however,
8 you find that there was no direct connection between
9 plaintiffs' prior convictions and their specific job duties,
10 you must find for plaintiffs.

11 Defendant contends that it did not terminate
12 Plaintiff Griffin. If you find that Plaintiff Griffin was not
13 terminated, but that he quit voluntarily, you must find that
14 defendant did not violate the statute as to Plaintiff Griffin.

15 If, however, you find that defendant unreasonably
16 terminated Plaintiffs Griffin and Godwin because of their
17 criminal conviction, in violation of the statute, then you
18 must find for Plaintiffs Griffin and Godwin.

19 Requirements, preferences, or attitudes of
20 defendants' clients, customers, or principals such as Allied
21 Van Lines or Sirva, Inc. are not relevant to your
22 determination of whether or not defendant complied with its
23 obligations under the statute.

24 Now I'm going to instruct you on damages, but let me
25 caution you that just because I am instructing you on how to

JURY CHARGE

110

1 award damages does not mean that I have any opinion on whether
2 or not the defendant should be held liable for any of
3 plaintiffs' claims. If the plaintiffs have proven by a
4 preponderance of the evidence that the defendant is liable,
5 you must determine the actual damages to which each plaintiff
6 is entitled. It is exclusively your function to decide upon
7 liability, and I am instructing you on damages only so that
8 you will have guidance should you decide that plaintiffs are
9 entitled to recovery.

10 As to plaintiffs' minimum wage, actual pay and
11 overtime claims, you should only consider the issue of damages
12 if you first find that the plaintiffs have proven by a
13 preponderance of the evidence that the defendants violated the
14 Fair Labor Standards Act under New York Labor Law. If you
15 return a verdict for the defendant, then you need not consider
16 damages on this claim.

17 If you find that any plaintiff has proven that the
18 defendant is liable to him for unpaid minimum wages and/or
19 unpaid overtime, then you must determine what amount of money
20 that plaintiff is owed. This determination must be made for
21 each plaintiff. The measure of damages is the difference
22 between the amount you find that plaintiff should have been
23 paid under the minimum wage and overtime laws and the amount
24 you find that the defendant actually paid to the plaintiff you
25 are considering.

JURY CHARGE

111

1 In determining the amount of damages that you decide
2 to award, you should be guided by dispassionate common sense.
3 You must use sound discretion in fixing an award of damages,
4 drawing reasonable inferences from the facts in evidence. You
5 may not award damages based on sympathy, speculation or
6 guesswork. On the other hand, the law does not require that
7 plaintiffs prove the amount of their losses with mathematical
8 precision, but only with as much definitiveness and accuracy
9 as circumstances permit. The unpaid wages can be inferred
10 from the circumstances presented to you by the evidence, or
11 they can be proven by testimony going solely to the issue of
12 damages.

13 Remember, it is plaintiffs' burden to prove that
14 they are owed unpaid wages and to prove the amount. The award
15 must be based upon evidence and not upon speculation,
16 guesswork or conjecture.

17 If you find that Plaintiff Griffin or Plaintiff
18 Godwin has proved by a preponderance of the evidence all three
19 elements of their race discrimination claim, and/or that
20 defendant terminated their employment based upon their
21 criminal convictions, in violation of New York State Human
22 Rights Law, you must then consider the issue of damages.
23 Damages must be based on evidence, and plaintiffs have the
24 burden of proving damages by a preponderance of the evidence.

25 You must award the plaintiffs the sum of money that

JURY CHARGE

112

1 will justify and fairly compensate them for any injury you
2 find they suffered as a direct result of the defendant's
3 violation. Compensatory damages must be based on evidence,
4 not speculation or sympathy. At the same time, in determining
5 the amount of the award, it may often be impossible for you to
6 arrive at a precise amount. For example, compensatory damages
7 are available for emotional distress and humiliation under
8 Section 1981 and under the New York State Human Rights Law.
9 It is difficult to arrive at a precise calculation of actual
10 damages for emotional harm from a violation of these laws.
11 Nonetheless, it is necessary to arrive at a reasonable award
12 that is supported by the evidence offered by the plaintiffs.

13 If the plaintiffs prove that the injury they
14 suffered extends into the future because they will be denied
15 future economic opportunities as a result of the defendant's
16 discriminatory actions, then the damages you award may
17 compensate them for that loss. In making your calculation,
18 however, you must include a reduction of future damages, as in
19 loss of income, to present value in order to take into account
20 the earning power of the money awarded.

21 The damages you award may include an award of back
22 pay. You may determine the amount of back pay or lost wages
23 that is due to plaintiffs by calculating the hours of work and
24 the amount of wages lost by the plaintiffs as a result of the
25 violation of Section 1981 and/or the New York State Human

JURY CHARGE

113

1 Rights Law.

2 Even if you find that no actual damages were proven,
3 you should award the sum of \$1 -- which is called "nominal
4 damages" -- to reflect your finding that the defendant is
5 liable for a violation of Section 1981 and/or the New York
6 State Human Rights Law.

7 In considering damages you will award to the
8 plaintiffs, you must remember that the plaintiffs are
9 obligated to take reasonable steps to mitigate or diminish the
10 damages suffered. It is, however, the defendant's burden to
11 prove, by a preponderance of the evidence, that the plaintiffs
12 failed to take reasonable steps to diminish the extent of the
13 injuries suffered. If the defendant proves this, you should
14 reduce your award by the amount of damages that would have
15 been avoided if the plaintiffs had taken reasonable steps to
16 mitigate the consequences of the harm.

17 Whether or not you award plaintiffs actual damages,
18 you may also, in your discretion, make an award of punitive
19 damages. Punitive damages are awarded, in the discretion of
20 the jury, to punish a defendant for extreme or outrageous
21 conduct, and to deter or prevent a defendant and others like
22 him or her from committing such conduct in the future.

23 You may award plaintiff punitive damages if you find
24 that the acts of defendant were done maliciously or wantonly.
25 An act is maliciously done if it is prompted by ill will or

JURY CHARGE

114

1 spite towards the injured person. An act is wanton if done
2 with a reckless or callous disregard for the rights of the
3 injured person. Plaintiffs have the burden of proving by a
4 preponderance of the evidence that the defendant acted
5 maliciously or wantonly with regard to plaintiffs' rights.

6 If you find by a preponderance of the evidence that
7 defendant acted with a malicious intent to violate plaintiffs'
8 rights, or if you find that a defendant acted with a callous
9 or reckless disregard of plaintiffs' rights, then you may
10 award punitive damages. An award of punitive damages,
11 however, is discretionary; that is, if you find that the legal
12 requirements for punitive damages are satisfied, then you may
13 decide to award punitive damages, or you may decide not to
14 award them.

15 In making that decision, you should consider the
16 underlying purpose of punitive damages. Punitive damages are
17 awarded in the jury's discretion to punish a defendant for
18 outrageous conduct or to deter him or her and others like him
19 or her from performing similar conduct in the future. Thus,
20 in deciding whether to award punitive damages, you should
21 consider whether the defendant may be adequately punished by
22 an award of actual damages only, or whether the conduct is so
23 extreme and outrageous that actual damages are inadequate to
24 punish the wrongful conduct.

25 You should also consider whether actual damages,

JURY CHARGE

115

1 standing alone, are likely to deter or prevent the defendant
2 from similar wrongful conduct in the future, if it was in fact
3 wrongful, or whether punitive damages are necessary to provide
4 deterrence. Finally, you should consider whether punitive
5 damages are likely to deter or prevent other persons from
6 performing wrongful acts similar to those the defendant may
7 have committed.

8 If you decide to award punitive damages, these same
9 purposes should be kept in mind as you determine the
10 appropriate sum of money to be awarded. This is, in fixing
11 the sum to be awarded, you should consider the degree to which
12 the defendant should be punished for his or her wrongful
13 conduct, and the degree to which an award of one sum or
14 another will deter the defendant or persons like him or her
15 from committing wrongful acts in the future.

16 I guess that means it's time to end for the day. My
17 mic just decided to go out without any effort on my part.

18 I am now giving you closing instructions, and I
19 realize that it has taken me longer than I expected. It is
20 now 5:25. So after I give you the closing instructions, I'll
21 let you leave for tonight and come back tomorrow morning, 9:30
22 or 10. You tell me which you prefer. You, however, will not
23 be able to deliberate until you are all present.

24 I have now outlined for you the rules of law
25 applicable to this case, the process by which you weigh the

JURY CHARGE

116

1 evidence and determine the facts, and the legal elements which
2 must be proved by a preponderance of the evidence. Tomorrow
3 morning you will retire to the jury room for your
4 deliberations, and I'm giving you just some general rules that
5 you should keep in mind.

6 Keep in mind that nothing I have said in these
7 instructions is intended to suggest to you in any way what I
8 think your verdict should be. That is entirely for you to
9 decide.

10 By way of reminder, I instruct you once again that
11 it is your responsibility to judge the facts in this case from
12 the evidence presented during the trial and apply the law as I
13 have now given it to you. Remember also that your verdict
14 must be based solely on the evidence in the case and the law.

15 In order for your deliberations to proceed in an
16 orderly fashion, you must have a foreperson. The custom in
17 this courthouse is for Juror No. 1 to be the foreperson.
18 However, if and when you begin your deliberations, you decide
19 that you want to elect another person, you are free to do so.
20 Of course, the foreperson's vote has no more weight than
21 everyone else's.

22 It is very important that you not communicate with
23 anyone outside of the jury room about your deliberations or
24 about anything touching on this case. There is only one
25 exception to this rule. If it becomes necessary during your

JURY CHARGE

117

1 deliberations to communicate with me, you should send a note
2 through the marshal signed by your foreperson. There will be
3 a marshal sitting outside of your jury room for the entire
4 duration of your deliberation. The note has to be signed by
5 the foreperson. All notes should be signed by the foreperson.

6 No member of the jury should attempt to communicate
7 with me except by signed writing, and I will never communicate
8 with any member of the jury on any subject touching upon the
9 merits of this case other than in writing or orally here in
10 court.

11 Your recollection governs, no one else's. If, in
12 the course of your deliberations, your recollection of any
13 part of the testimony should fail, or you should find yourself
14 in doubt concerning my instructions on the law, you can return
15 to the courtroom for the purpose of having such testimony or
16 instructions read back to you. You want to make that request
17 by sending a note to the marshal. I suggest that you try to
18 be specific so that you avoid hearing testimony that you do
19 not need to hear. Tell me as best as you can precisely what
20 evidence you would like to hear or instruction of law and be
21 patient while we find it. Sometimes it does take us a minute
22 to do so. If you want to see any of the exhibits, please send
23 me a note and the requested exhibit will be sent back to you.

24 Your duty is to reach a fair conclusion from the law
25 and the evidence. It is an important one. When you are in

JURY CHARGE

118

1 the jury room, listen to each other and discuss the evidence
2 and the issues in the case amongst yourself. It is the duty
3 of each of you, as jurors, to consult with one another and to
4 deliberate with a view toward reaching agreement on a verdict,
5 if you can do so without violating your individual judgment
6 and conscience. While you should not surrender conscientious
7 convictions of what the truth is and of the weight and effect
8 of the evidence, and while each of you must decide the case
9 for yourself and not merely acquiesce in the conclusion of
10 your fellow jurors, you should examine the issues and the
11 evidence before you with candor and frankness, and with proper
12 deference to, and regard for, the opinions of your fellow
13 jurors.

14 You should not hesitate to reconsider your opinions
15 from time to time and to change them if you are convinced that
16 they are wrong. However, do not surrender an honest
17 conviction as to the weight and effect of the evidence simply
18 to arrive at a verdict.

19 The decision you reach must be unanimous. You must
20 all agree. When you have reached a verdict, simply send me a
21 note signed by the foreperson that you've reached a verdict.
22 Do not indicate what the verdict is. In no communication with
23 me should you give a numerical count of where the jury stands.

24 Remember in your deliberations that the dispute
25 between the parties is, for them, no passing matter. They and

JURY CHARGE

119

1 the Court rely upon you to give full and conscientious
2 deliberation and consideration to the issues and evidence
3 before you. By so doing, you carry out to the fullest your
4 oaths as jurors to well and truly try the issues of this case
5 and a true verdict render.

6 That is the charge. I am simply going to meet with
7 the parties for one minute at sidebar to see if there's
8 anything else they want me to add.

9 (The following occurred at sidebar.)

10 THE COURT: Anything I need to add?

11 MR. LICHTEN: No.

12 MR. HACKER: No, nothing to add.

13 (End of sidebar.)

14 THE COURT: We're done. I'm going to swear the
15 marshal so that tomorrow morning when you come in just --
16 would you like to start at 9:30 or 10?

17 THE JURORS: 10.

18 THE COURT: 10:00 it is. Can you swear the marshal?

19 (Marshal sworn.)

20 THE COURT: Okay. So I'm discharging you for
21 tonight because of the late hour. I do remind you that when
22 you come in in the morning, if anyone is running late you have
23 to wait until you are all together. You cannot start your
24 deliberations without everyone being present. Okay? Yes?

25 THE JURORS: Do we sign in downstairs first?

JURY CHARGE

120

1 THE COURT: Do they have to sign in?

2 COURTROOM DEPUTY: Yes.

3 THE COURT: Yes, you do. Have a good night. Don't
4 discuss the case. You still can't discuss it, not even
5 amongst yourself, until you're all together tomorrow. Have a
6 good night.

7 (Jury exits courtroom.)

8 THE COURT: I'll see the parties at 10 tomorrow.
9 Have a good night.

10 MR. LICHTEN: Good night.

11 MR. HACKER: Good night, Your Honor.

12 (Whereupon, the proceedings were adjourned until
13 10:00 a.m. November 21, 2014.)

14

15

16

17

18

19

20

21

22

23

24

25

I N D E X

WITNESS

LAURA SMITH	2
DIRECT EXAMINATION	2
BY MR. HACKER	
CROSS-EXAMINATION	5
BY MR. LICHTEN	